Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
WILLIAM GARIBALDI AND CARLOS SAMUEL

Petitioners

v.

ORLEANS PARISH SCHOOL BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(6) authorizes a district court to grant relief from a final judgment in "extraordinary circumstances," the determination of which is left to that court's sound discretion. The question presented is whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law—regardless of the facts and circumstances that accompany such change.

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PETITION FOR WRIT OF CERTIORARI

William Garibaldi and Carlos Samuel, for themselves and also for the United States Government, *see* 31 U.S.C. § 3730(b)(1), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. 1a-10a) is reported at 397 F.3d 334; a prior opinion of that court (App. 25a-41a) is reported at 244 F.3d 486. The opinion of the District Court for the Eastern District of Louisiana (App. 11a-24a) is unreported; a prior opinion of that court (App. 42a-83a) is reported at 46 F. Supp. 2d 546.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

STATEMENT OF THE CASE

As found by the jury and as confirmed by the district court in post-verdict proceedings, respondent Orleans Parish School Board ("the Board") "submitted more than 1500 false claims to the federal government over the course of 11 years." App. 12a. Petitioners William Garibaldi and Carlos Samuel ("the Relators") were employed in the Board's Audit Department; they discovered the fraud and reported it to their boss, the Superintendent of the Board. *See* App. 26a-27a. For their efforts, Samuel was fired and Garibaldi was suspended pending a termination hearing. *See* App. 28a.

A. Round One.

The Relators instituted a "*qui tam* action" against the Board in the United States District Court for the Eastern District of Louisiana. Pursuant to 31 U.S.C. § 3730(b)(1), the Relators asserted violations of the False Claims Act "in the name of the Government"; pursuant to § 3730(h), they also asserted that the Board had retaliated against them in violation of the Act's protections for "whistleblowers." *See* App. 28a. Following nine days of testimony, the jury found that the Board had submitted 1,570 false claims and had illegally retaliated against the Relators for bringing those claims to light; the jury further found that the Government had suffered actual financial damages of $7.6 million as a result of the false claims, that the Relators had each sustained pain and suffering in the modest amount of $65,000 as a result of the illegal retaliation, and that Samuel had lost an additional $103,000 in wages for that same reason. *See id.* After trebling the Government's actual damages (to $22.8 million) and adding a penalty of $5,000 for each false claim ($7.85 million more) pursuant to 31 U.S.C. § 3729(a), the district court entered judgment against the Board for nearly $31 million. *See* App. 29a, 43a.

That amount was substantially reduced in post-verdict proceedings. In a lengthy ruling, the district court rejected most of the parties' attacks on the judgment, including the

Board's motion for judgment as a matter of law pursuant to Federal Rule 50(b). *See* App. 44a-65a. The court did, however, reduce the Government's actual damages by slightly more than $300,000; more significantly, the court exercised its discretion under Fifth Circuit precedent to eliminate almost entirely the civil penalty assessed against the Board, reducing it by more than 98% from $7.85 million to a mere $100,000. *See* App. 29a-30a. Having reduced the Government's recovery from nearly $31 million to just under $23 million, the district court reaffirmed its decision to award the Relators the very *minimum* percentage of the recovery to which they were entitled under 31 U.S.C. § 3730(d)(2), i.e., 25%. *See* App. 70a-71a.

The Board satisfied the portion of the judgment attributable to the Relators' claims of retaliation, but all parties appealed with respect to the judgment on the false claims. *See* App. 29a n.1, 30a. The Court of Appeals for the Fifth Circuit pretermitted all other issues in order to resolve "the issue we find dispositive, namely whether a local government such as the School Board may be held liable under the False Claims Act." App. 30a. Observing that those "district courts that have considered the issue are divided" and that the "issue is one of first impression for this court, and for the courts of appeal[s] generally," App. 31a, the Fifth Circuit answered the question in the negative.

The court of appeals relied largely on this Court's then-recent decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000), said to be "conclusive" on the point that the "treble damages imposed by the False Claims Act are *punitive* damages." App. 34a n.5 (emphasis added). In light of the supposedly "well-settled presumption that governments, including local governments, are not subject to punitive damages," App. 34a, the court of appeals concluded that the "punitive damages regime of the False Claims Act shows a congressional intent that the False Claims Act should not be applied to local governments," App. 41a. Accordingly, the Fifth Circuit vacated

the $23 million judgment in favor of the Government and rendered judgment on the false claims in favor of the Board. *See* App. 41a.

The Relators then sought relief in this Court. As noted above, however, the Fifth Circuit was the very first court of appeals to consider whether local governments are subject to *qui tam* actions under the False Claims Act. Faced with a question of unmistakably first impression, this Court not surprisingly denied the Relators' petition for certiorari. *See* 534 U.S. 1078, *reh'g denied*, 534 U.S. 1172 (2002) (docketed as No. 01-510). With that denial, the Fifth Circuit's judgment on the false claims in favor of the Board became final.

B. The Interlude.

Not two months after the Court finally disposed of the Relators' petition, it received the petition of Cook County, Illinois, which sought review of the Seventh Circuit's decision finding that local governments are indeed amenable to *qui tam* actions. *See United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 980 n.10 (7th Cir. 2002) (noting that this holding "creates an intercircuit conflict" with the Fifth Circuit's ruling in Relators' case) (docketed as No. 01-1572). Barely a month after receiving Cook County's petition, the Court received still another petition presenting the same question, this one from the Third Circuit. *See United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 225 (3d Cir. 2002) (holding, in accord with the Fifth Circuit in Relators' case, that "Congress did not intend to subject local governments to punitive damages under the [False Claims Act]") (docketed as No. 01-1711).

The Court soon granted Cook County's petition. In a *unanimous* opinion that cited the conflict between the decision under review and the decisions of the Third and Fifth Circuits in *Dunleavy* and in the Relators' case, respectively, this Court held that the "term 'person' in [the False Claims Act, 31 U.S.C. § 3729] included local governments in 1863 and nothing in the 1986 amendments redefined it." *Cook*

County v. United States ex rel. Chandler, 538 U.S. 119, 133 (2003); *see also id.* at 125 & n.6 (describing the circuit conflict). Contra the Fifth Circuit's reasoning in the Relators' case, *see* App. 34a-35a, the Court explained that "although *Stevens* recognized that the [Act's] treble damages remedy is still 'punitive' in that recovery will exceed full compensation in a good many cases, the force of this punitive nature in arguing against municipal liability is not as robust as if it were a pure penalty in all cases," for "[t]reble damages certainly does not equate with classic punitive damages." 538 U.S. at 131-32. The Court observed that the question in municipal defendant cases "is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket"—a question to be answered in any given case "by a combination of the [trial] judge's discretion and the Government's power to intervene and dismiss or settle an action." *Id.* at 132.

After issuing this decision, the Court granted the petition of the *Dunleavy* relators, vacated the Third Circuit's erroneous decision in favor of Delaware County, Pennsylvania, and remanded the case for reconsideration in light of *Cook County*. *See* 538 U.S. 918 (2003).

C. Round Two.

The unanimous decision in *Cook County* was handed down on March 10, 2003. On May 12, 2003, the Relators returned to the district court and sought relief from the Fifth Circuit's final judgment in favor of the Board in Round One. *See* App. 4a. The substantive basis for such relief was, of course, this Court's ruling in *Cook County* that local governments like the Board are indeed subject to *qui tam* actions under the False Claims Act. The procedural basis for the relief was Federal Rule of Civil Procedure 60(b), which provides that, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment" for specified reasons, the sixth and final one being "any other reason justifying relief from the operation of the judgment."

As construed by this Court, Rule 60(b)(6) provides the district courts "with authority adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice", however, the rule "should only be applied in 'extraordinary circumstances.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Like all decisions to grant or deny relief under Rule 60(b), the determination whether extraordinary circumstances are present is committed to the district court's sound discretion, subject to review for abuse of that discretion. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 & n.7 (1978).

The district court here exercised its discretion in favor of the Relators, expressly finding that "because of the extraordinary circumstances surrounding this case, the motion [for relief from the judgment] must be granted." App. 11a. The court acknowledged that "a simple 'change in decisional law' is not enough to trigger Rule 60(b)(6)," App. 23a, but it found that the present case involved more that a "simple" change, for essentially four reasons:

> (1) "But for [the Relators' case], there would not have been the two to one split upon which the Supreme Court ultimately based its grant of [certiorari in *Cook County*]." App. 23a.
>
> (2) *Cook County* "found the very basis for the Fifth Circuit's decision to be devoid of merit." *Id.*
>
> (3) That the Relators' case, the Third Circuit case, and the Seventh Circuit case "were all under consideration at substantially the same time and played a role in the Supreme Court's decision"—but of all *qui tam* plaintiffs in the three cases, the Relators alone got no benefit from that decision—"presents proof that enforcement of the judgment would work an injustice," indeed, a "substantial" injustice. *Id.*

> (4) "[I]t would be simple serendipity that determined that the federal taxpayer was to be permanently out of pocket the funds at issue herein. This course of action cannot be countenanced in the meting out of justice." App. 24a.[1]

Exercising its discretion in light of the foregoing, the district court found that "extraordinary circumstances exist and the [Rule 60(b)(6)] motion must be granted." *Id.* Accordingly, the court reinstated its prior amended judgment in favor of the Government and the Relators in respect to the Board's 1,570 false claims. *See id.*

On appeal, the Fifth Circuit reversed. The court did acknowledge that relief under Rule 60(b)(6) is appropriate in an "extraordinary situation" or "if extraordinary circumstances are present." App. 5a (quoting, respectively, *Klapprott v. United States*, 335 U.S. 601, 613 (1949), and *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996)). What the court did ***not*** acknowledge, however, was the district court's discretion in general or its weighing of the equities in this case in particular. Instead, the Fifth Circuit simply performed its own, independent "examination of the details of the arguments for reopening the judgment." App. 7a. That examination yielded the conclusion that the "present case is not atypical of the many instances in which the Supreme Court has granted certiorari and rendered a decision resolving a circuit split." App. 6a. In other words, "we do not think the present case has any features that cause it to be exceptional to such a marked extent from other cases involving resolution of circuit conflicts." *Id.*

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[1] The district court could have advanced two more reasons: one, the case had already been fully tried to verdict, such that granting the Relators' motion did ***not*** necessitate a long-delayed retrial, with the attendant dangers of faded memories or otherwise stale evidence; and two, the original judgment in favor of the Board on the false claims was "unexecuted," in that no transfer of money or property had taken place as a result of that judgment.

In reaching its own, independent conclusion that the present case was neither atypical nor exceptional (and thus presented no "extraordinary circumstances"), the Fifth Circuit did two things of note. First, the court repudiated as "dicta unnecessary to [its] holding" the statement in *Batts* that "relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, 'such as where the Supreme Court resolves a conflict between another circuit ruling and that case.'" App. 7a (quoting *Batts*, 66 F.3d at 748 n.6).

Second, the Fifth Circuit confronted the Eleventh Circuit's decision in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987). *See* App. 7a-9a. Using language that courts employ to denigrate a decision without expressly criticizing it—"*even if* we were to assume or agree [that *Ritter*] presented 'extraordinary circumstances' under Rule 60(b)(6)"—the Fifth Circuit found *Ritter* "clearly distinguishable," App. 7a (emphasis added), even as the court conceded that "[n]o two cases are truly identical," App. 10a.

Accordingly, the court of appeals reversed the district court's grant of relief under Rule 60(b)(6) and reinstated the erroneous-but-final judgment that had resulted from Round One. *See* App. 10a.

REASONS FOR GRANTING THE PETITION

Balancing the competing considerations of finality and consistency, this Court has opined that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6). *Agostini v. Felton*, 521 U.S. 203, 239 (1997). This case presents the question whether, in saying *by themselves* and *rarely*, the Court actually meant *never*. The Fifth Circuit so ruled in the present case, and thereby issued a decision in conflict with the decisions of the Tenth and Eleventh Circuits on this important and recurring matter.

I. In Essentially Ruling that Rule 60(b)(6) Relief Can *Never* Rest on a Change in the Decisional Law, the Fifth Circuit's Decision Is in Conflict with the Decisions of Other Courts of Appeals.

Although the decision below does not purport to categorically prohibit relief under Rule 60(b)(6) premised on a change in the controlling decisional law, that is its essence. Despite the applicability of the abuse-of-discretion standard —and "the deference [to trial courts] that is the hallmark of abuse of discretion review," *GE Co. v. Joiner*, 522 U.S. 136, 143 (1997)—the Fifth Circuit *overturned* the district court's exercise of discretion to grant Rule 60(b)(6) relief. Before the decision below, the Fifth Circuit did the same thing in *Batts*, 66 F.3d at 751. Before *Batts*, the Fifth Circuit did the same thing in *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002). Before *Hess*, the Fifth Circuit did the same thing in *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990), and in *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.), *cert. denied*, 498 U.S. 829 (1990). And so on.

To be sure, *Batts* does contain a footnote in which the Fifth Circuit—again, in the course of *overturning* a district court's grant of relief under Rule 60(b)(6)—opined: "We do not hold that a change in decisional law can never be an extraordinary circumstance." 66 F.3d at 748 n.6. But it was this very footnote, and particularly its reliance on the Eleventh Circuit's decision in *Ritter v. Smith*, that the decision below expressly repudiated as "unnecessary" "dicta." App. 7a; *see also id.* n.22 (citing *Batts*, 66 F.3d at 748 n.6). It is to the *Ritter* decision that we turn first.

A. The Eleventh Circuit's Decision in *Ritter v. Smith*.

In the first *Ritter v. Smith*, 726 F.2d 1505, 1517 (11th Cir. 1984), the Eleventh Circuit held that Alabama's capital sentencing scheme was "facially unconstitutional" because of a peculiar provision involving the pronouncement by the jury of a death "sentence" at the guilt phase. The court of

appeals ordered the district court to grant a writ of habeas corpus unless the petitioner Ritter was resentenced in the absence of this jury "sentence." *See id.* at 1519. This Court denied the state's petition for certiorari in due course, 469 U.S. 869 (1984), after which the court of appeals issued its mandate, and the district court entered judgment thereon. *See Ritter*, 811 F.2d at 1400. Thereafter, the Court granted certiorari in *Baldwin v. Alabama*, 469 U.S. 1085 (1984), to review the same sentencing scheme. In its decision on the merits, the Court expressly cited the conflict between *Ritter v. Smith* and the Alabama Supreme Court's decision in *Ex parte Baldwin*, 456 So. 2d 129 (Ala. 1984). *See Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). The Court resolved the conflict in the state's favor, ruling that the jury "sentence" was "peculiar" but not "unconstitutional," and so affirmed Baldwin's capital sentence. *Id.* at 389.

In the second *Ritter v. Smith*, Alabama sought relief from the earlier final judgment in favor of Ritter premised on the change in decisional law wrought by *Baldwin*. The district court granted such relief under Rule 60(b)(6), and the Eleventh Circuit affirmed. The court concluded that the relevant decisions "plainly allow Rule 60(b)(6) relief where there has been a clear-cut change in the law"; however, "it is also clear that a change in the law will not always provide the truly extraordinary circumstances necessary to reopen a case." 811 F.2d at 1401. Thus, although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," several additional factors persuaded the court that "the circumstances are sufficiently extraordinary to warrant relief under Rule 60(b)(6)." *Id.*

The three principal factors identified by the Eleventh Circuit are equally present here:

> (1) "the previous, erroneous judgment of this court had not been executed," *id.*; *cf. supra* note 1 (noting that the same holds true with respect to the previous, erroneous judgment of the Fifth Circuit in the present case);

> (2) "there was only minimal delay between the finality of the judgment [Dec. 3, 1984] and the motion for Rule 60(b)(6) relief [Sept. 9, 1985]," *Ritter*, 811 F.2d at 1402; *cf.* App. 3a-4a (finality on Feb. 25, 2002; motion on May 12, 2003); and
>
> (3) "the close relationship between the two cases at issue, *Baldwin* and *Ritter*," namely, that this Court "granted certiorari in *Baldwin* for the express purpose of resolving the dispute between these two cases," *Ritter*, 811 F.2d at 1402; *cf. Cook County*, 538 U.S. at 125 & n.6 (noting that certiorari was granted to resolve the conflict between the decision below and the decisions of the Third and Fifth Circuits in *Dunleavy* and the Relators' case, respectively).[2]

Based on these considerations, the Eleventh Circuit upheld the district court's "finding that the particular facts of this case constitute such extraordinary circumstances." *Ritter*, 811 F.2d at 1404.

In the decision below, of course, the Fifth Circuit both sniffed at *Ritter v. Smith*—refusing explicitly to "assume or agree" that it was correctly decided—and found it "clearly distinguishable." App. 7a. Quite frankly, the distinctions drawn by the Fifth Circuit are so strained as to make outright disagreement with the Eleventh Circuit the far more cogent explanation for the result below.

First, the Fifth Circuit pointed out that "considerations of comity for state laws and state judicial decisions are not present in this federal question case." App. 8a. That is cor-

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[2] The Eleventh Circuit also cited "considerations of comity," i.e., the "state has a strong interest in assuring that constitutionally valid state court judgments are not set aside and can be carried out without undue delay." *Ritter*, 811 F.2d at 1403. As explained in the text below, however, the court significantly (if not wholly) retreated from these considerations later in its opinion.

rect as a technical matter, but *Ritter* made clear that such considerations were the least important of all. *See* 811 F.2d at 1403 (listing comity as the fourth of four considerations). More importantly, *Ritter* significantly (if not wholly) downplayed comity later in the opinion: "Were the roles in this case reversed, it is clear that Ritter could have received the benefit of an intervening favorable Supreme Court ruling inconsistent with a decision of our court." *Id.* at 1404. If a habeas petitioner who sought to *upset* the finality of a state-court judgment would receive the same benefit as the state that sought to *preserve* that judgment, then "it is clear" (as the Eleventh Circuit itself put it) that comity adds little, if anything, to the calculus. Indeed, the actual consideration would appear to be not comity, but *consistency*.

Second, the Fifth Circuit asserted that because of the Third Circuit's decision in *Dunleavy*, its erroneous decision in Round One "was not essential to the circuit split." App. 8a. But some sort of metaphysical essentiality was not the point made by *Ritter*; rather, the point was simply the "close relationship" between the erroneous prior decision and the decision by which this Court revealed the error, such closeness being manifested by an expressly recognized conflict. 811 F.2d at 1403. As noted above, such express recognition by this Court was functionally identical in both situations. *Compare Baldwin*, 472 U.S. at 374, *with Cook County*, 538 U.S. at 125 & n.6.

Third, the Fifth Circuit asserted that its erroneous decision in Round One was "not apt to have prospective effects analogous to those of an executory constitutional ruling affecting a state's capital sentencing procedures" like the first *Ritter v. Smith*. App. 8a. But the minor premise that the first *Ritter* had any lingering "prospective effects" is false. By the time the Eleventh Circuit heard the appeal from the grant of Rule 60(b)(6) relief, its prior decision had been declared erroneous by this Court in *Baldwin* and accordingly had "effects" in Ritter's case *alone*. Yet that singularity and lack of prospectivity did not stop the Eleventh Circuit from

agreeing with the district court that the circumstances were "sufficiently extraordinary to justify disturbing the finality of the judgment." 811 F.2d at 1402.

Fourth, the Fifth Circuit asserted that its erroneous decision in Round One was "more analogous to a fully executed judgment than to Ritter's 'unexecuted' judgment." App. 8a. This assertion is baffling. The court identified no money or other property that had changed hands as a result of the Round One judgment, nor did the court point to any other affected interest (like title to land) that the concept of finality is especially concerned to protect. In essence, that judgment was as much "unexecuted" as the judgment in the first *Ritter v. Smith*. Indeed, as in *Ritter*, relief in this case can be afforded without additional proceedings in the district court, given that the matter was fully tried to verdict (and underwent considerable post-verdict proceedings) in Round One.[3]

Finally, the Fifth Circuit observed that this case "does not arise from the same factual transaction as *Chandler*'s FCA suit against Cook County, Illinois." App. 9a. This observation is certainly true, but it hardly provides a basis for distinguishing *Ritter*: Ritter's case did not arise from the same "transaction" as Baldwin's. *Compare Ritter*, 811 F.2d at 1399 (murder of Edward Nassar) *with Baldwin*, 472 U.S. at 374 (murder of Naomi Rolon). Rather, the two cases involved the constitutionality of the same capital sentencing scheme, just as the present case and *Cook County* involve the proper interpretation of the same provision of the False Claims Act, 31 U.S.C. § 3729(a).

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[3] The Fifth Circuit noted here that "final civil judgments having the effect of res judicata, even if un-executed, are not voided or affected by a subsequent change in the decisional law on which they were based." App. 8a n.27. "Generally speaking," *id.*, this is no doubt true, but it begs the very question presented here—whether Rule 60(b)(6) can *ever* "affect" a final judgment in light of changes in the controlling decisional law.

In short, had the district court's exercise of discretion under Rule 60(b)(6) been reviewed in the Eleventh Circuit pursuant to *Ritter v. Smith*, it would have been sustained. In overturning that exercise of discretion, the Fifth Circuit issued a decision in conflict with the Eleventh Circuit.

B. The Tenth Circuit's Decision in *Pierce v. Cook & Co.*

On the same side of the divide as the Eleventh Circuit stands the Tenth Circuit. In the widely cited *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1079 (1976), the court considered whether relief was available under Rule 60(b)(6) to reopen a judgment in light of an intervening decision of the Oklahoma Supreme Court. The case was a multi-plaintiff diversity action arising out of an automobile accident. The first *Pierce* decision affirmed a summary judgment for the defendant based on controlling Oklahoma precedent. *See* 437 F.2d 1119, 1122 (10th Cir. 1970) (citing *Marion Machine, Foundry & Supply Co. v. Duncan*, 101 P.2d 813 (Okla. 1940)). Another victim of that same accident litigated his claim in the Oklahoma courts and, more than three years after the Tenth Circuit decision became final, obtained a decision expressly overruling that Oklahoma precedent. *See Hudgens v. Cook Industries, Inc.*, 521 P.2d 813, 816 (Okla. 1973). The federal plaintiffs then returned to federal court seeking relief based on this change in the controlling decisional law. The Tenth Circuit granted that relief in the second *Pierce* decision.

Applying the rule that "in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice," 518 F.2d at 723, the court found the situation "extraordinary" in large part because of the *relatedness* of the federal and state cases. That is, "the decisional change . . . came in a case arising out of the same accident as that in which the plaintiffs now before us were injured." *Id.*; *see also Ritter*, 811 F.2d at 1403 (observing that "the two relevant cases in

Pierce were closely related, thereby creating the extraordinary circumstances necessary for Rule 60(b) relief").

The Tenth Circuit also drew support from this Court's extraordinary actions in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), *discussed in Pierce*, 518 F.2d at 723. In *Gondeck*, the Fifth Circuit had overturned the Labor Department's award of death benefits to the survivor of an employee killed in a jeep accident outside of a defense base in the British West Indies. *Id.* at 26. The survivor sought review here, but the Court denied her petition for certiorari on June 11, 1962. 370 U.S. 918. The Court then denied her petition for rehearing on October 8, 1962. 371 U.S. 856. But on the survivor's motion for leave to file a *second petition for rehearing*, the Court granted the petition on October 18, 1965, *more than* ***three years*** *later*, and reversed the Fifth Circuit's judgment.

The Court was motivated to this extraordinary action by the Fourth Circuit's intervening decision upholding the Department's award to the survivors of another employee killed in the same accident. *See* 382 U.S. at 26-27. In addition to these "intervening circumstances," the Court acted because "the Fifth Circuit misinterpreted the [governing] standard in this case" and further because "of those eligible for compensation from the accident, this petitioner stands alone in not receiving it." *Id.* at 28. These circumstances implicated the maxim that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's regular] rules." *Id.* at 26-27 (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)); *see also id.* at 30 (Harlan, J., dissenting) ("The result reached in this case has been achieved at the expense of the sound legal principle that litigation must at some point come to an end.").[4]

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[4] The Eleventh Circuit's decision in *Ritter*, 811 F.2d at 1403, also drew support from *Gondeck*.

Although the Tenth Circuit's decision in *Pierce* is several decades old, it retains vitality and has been extended to the very situation of the present case: "In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under [Rule] 60(b)(6)." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (citing *Pierce*), *quoted in Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491 (10th Cir. 1994); *see also Woods v. Kenan (In re Woods)*, 173 F.3d 770, 780 (10th Cir.) (relying on *Pierce* in upholding a bankruptcy court's reliance on Rule 60(b)(6) to reopen a case two years after it had been closed), *cert. denied*, 528 U.S. 878 (1999).[5]

In short, had the district court's exercise of discretion under Rule 60(b)(6) been reviewed in the Tenth Circuit pursuant to *Pierce v. Cook & Co.* and its progeny, it would have been sustained. In overturning that exercise of discretion, the Fifth Circuit issued a decision also in conflict with the Tenth Circuit. That conflict, in conjunction with the Fifth Circuit's additional conflict with the Eleventh Circuit's decision in *Ritter v. Smith*, warrants review by this Court.

II. The Authority of the District Courts to Grant Rule 60(b)(6) Relief Based on a Change in the Decisional Law Is a Recurring Question as to Which the Lower Courts Exhibit Confusion.

In addition to the conflict catalogued above, review is warranted because the question presented is both recurring and (in two respects) a source of confusion in the lower federal courts. We take up these points in turn.

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[5] Notably, the Eleventh Circuit in *Ritter* expressly relied on *Pierce* in discussing relatedness: "An analogous situation arises where the two cases are related, not because the supervening decision was rendered to resolve a conflict between them but because they arose out of the same transaction." *Ritter*, 811 F.2d at 1402-03 (discussing *Pierce*, 518 F.2d at 722-23).

The recurrence of decisional law-related issues under Rule 60(b)(6) is surprisingly robust. In addition to the decisions from the Fifth, Tenth, and Eleventh Circuits treated above, recent and representative decisions from the First, Second, Third, Fourth, Seventh, and Eighth Circuits are collected in 12 *Moore's Federal Practice* § 60.48[5][b] & n.45 (3d ed. 2005), *cited in Agostini v. Felton*, 521 U.S. at 239. In most of these decisions, relief is denied, doubtless reflecting the "extraordinary circumstances" principle that is derived from *Ackermann v. United States*, 340 U.S. at 199. *But see Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (granting Rule 60(b)(6) relief based on a change in the controlling decisional law, because "[a]bsent a meaningful and substantive review of [the moving party's] case, manifest injustice will occur because the change in law goes to the very basis of [the party's] deportation").

On the other hand, in contrast to the decision below, these decisions also consistently reflect the principle that "the trial court is in a much better position [than the appellate courts] to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam). Accordingly, as set out in the margin, the decisions consistently *uphold* the district court's exercise of discretion.[6]

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[6] *See Reform Party v. Allegheny County Department of Elections*, 174 F.3d 305, 311-12 (3d Cir. 1999) (en banc) (concluding that the district court did not abuse its discretion in denying relief where the intervening decision of this Court "did not overrule the holding of the [prior] panel," and where the moving party "chose not to petition for certiorari in the [prior] case"); *Dowell v. State Farm Fire & Casualty Automobile Insurance Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (concluding that the district court did not abuse its discretion in denying relief where the movant deliberately chose not to appeal the original adverse ruling); *Cincinnati Insurance Co. v. Flanders Electric Motor Services*, 131 F.3d 625, 631 (7th Cir. 1997) (concluding that the "district court did not abuse its considerable discretion in determining that the change in state decisional law

(continued...)

But if these Rule 60(b)(6) issues are recurring, they are also occasions of confusion. One such occasion is the application of the principle that district courts have "discretion," *Browder*, 434 U.S. at 263 & n.7—or as the Seventh Circuit has put it, "considerable discretion," *Cincinnati Insurance Co. v. Flanders Electric Motor Services*, 131 F.3d 625, 631 (7th Cir. 1997)—in granting or denying relief pursuant to Rule 60(b)(6). For example, despite this Court's statement that "the trial court is in a much better position" to resolve Rule 60(b) issues, *Standard Oil*, 429 U.S. at 19, and its own acknowledgment that "a decision to reopen an action under Rule 60(b) will necessarily require fact-intensive weighing of the equities in a particular case," *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994), the Second Circuit has *overturned* a district court's exercise of discretion in circumstances very similar to those in the Tenth Circuit's decision in *Pierce*. *See id.* at 1272-75 (reversing grant of relief under Rule 60(b)(6)). Although it reached the opposite result, the Second Circuit also *overturned* a district court's exercise of discretion in *Pichardo v. Ashcroft*. *See* 374 F.3d at 56 (reversing denial of relief under Rule 60(b)(6)).

Likewise, the decision below exhibits virtually no respect for the institutionally superior position of the district court. Indeed, it fails to mention, let alone give the district court credit for considering, that the denial of Rule 60(b)(6) relief in this case will leave the federal taxpayer "permanently out of pocket" almost $20 million plus interest due to the School Board's 1,570 false claims. *See* App. 24a.

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[6] (...continued)
resulting from [two] Indiana Supreme Court cases . . . created no extraordinary circumstances"); *Kansas Public Employees Retirement System v. Reimer & Koger Associates*, 194 F.3d 922, 926 (8th Cir. 1999) (finding "no abuse of discretion in the district court's ruling" denying relief where the court "properly g[a]ve weight to equitable considerations," including conduct by the moving party that was "objectively unreasonable and done in bad faith"), *cert. denied*, 529 U.S. 1004 (2000).

Another occasion for confusion is exemplified by two of Judge Easterbrook's opinions for the Seventh Circuit. In *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988), the court of appeals affirmed the district court's decision to reopen a case under Rule 60(b)(6) to afford the plaintiffs the advantage of an intervening statutory amendment crafted to overrule *Smith v. Robinson*, 468 U.S. 992 (1984). That reopening "was necessary to afford the plaintiffs treatment similar to that received by others who were fortunate enough to receive final judgment before *Smith*." 847 F.2d at 1249. The district court faced "a hard choice," but its choice to reopen the judgment was affirmed because the court "resolved it in a principled way." *Id.*

By contrast, in *Norgaard v. DePuy Orthopaedics*, 121 F.3d 1074, 1076 (7th Cir. 1997), the court of appeals seemed to suggest that the choice to reopen a final judgment based on an intervening change in the law could not possibly be affirmed. While *Polites v. United States*, 364 U.S. 426, 433 (1960), "raised the possibility that 'a clear and authoritative change in governing law' would justify reopening" a final judgment, that "door was closed again" in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Norgaard*, 121 F.3d at 1076. Thus, the Seventh Circuit per Judge Easterbrook expressly took aim at the Tenth Circuit's decision in *Pierce*, concluding that the circumstances presented by that case are "not strong enough, given *Plaut*," to successfully invoke Rule 60(b)(6). 121 F.3d at 1078; *cf. id.* ("Thus it can be no surprise that other circuits have not followed *Pierce*.").

If the decade-old decision in *Plaut* has indeed rendered Rule 60(b)(6) a nullity in cases involving changes in controlling decisional law, only one court appears to know it. That ignorance, together with both the confusion in applying the abuse-of-discretion standard and the recurring character of the issue, confirm that the Court should take up the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April, 2005.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
Fifth Circuit

FILED

January 17, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-31010

UNITED STATES OF AMERICA ex rel.
WILLIAM GARIBALDI, CARLOS SAMUEL

Plaintiffs-Appellees

versus

ORLEANS PARISH SCHOOL BOARD

Defendants-Appellants

Appeal from the United States District Court for
the Eastern District of Louisiana

Before REAVLEY, JONES, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In the previous appeal in this qui tam action under the False Claims Act (FCA), *Garibaldi I*,[1] we vacated the plaintiffs' judgment on the verdict, and rendered judgment for the Orleans Parish School Board holding that the board was not a "person" subject to liability under the FCA. This court's judgment in that case became final when the Supreme Court denied certiorari.[2] Subsequently, the Supreme Court, in *Cook County v. United States ex rel. Chandler*,[3] held that local governments are "persons" amenable to qui tam actions under the FCA. Following the Supreme Court's decision in *Chandler*, the plaintiffs filed a motion in the district court for relief under Rule 60(b)(6) from this court's final judgment in *Garibaldi I*. The district court concluded that *Chandler* had overruled *Garibaldi I*, granted plaintiffs' motion, and re-entered its judgment on the verdict for the plaintiffs against the school board. The school board appealed. We reverse. In the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6). The circumstances here are not "extraordinary" because this case in not materially distinguishable from the "ordinary" case in which a subsequent change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

Background

The relators brought suit against their employer, the Orleans Parish School Board, on behalf of the United States for numerous violations of the False Claims Act, 31 U.S.C. § 3729, *et seq*. The jury returned a verdict in favor of the plaintiffs for $22,800,000, plus $7,850,000 for false claims.

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[1] *United States ex rel. Garibaldi* [*v. Orleans Parish School Bd.*], 244 F.3d 486 (5th Cir. 2001).

[2] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 534 U.S. 1078 (2002), *rehearing denied*, 534 U.S. 1172 (2002).

[3] 538 U.S. 119 (2003).

The district court subsequently issued an Amended Judgment reducing the award to $21,899,856, plus $100,000 for false claims. The relators were awarded 12.5% of the proceeds.

The school board appealed, arguing principally that as a local government unit it is not subject to liability under the FCA. This court agreed, vacated the judgment against the board, and rendered judgment against the plaintiffs.[4] The relators filed a petition for rehearing and for rehearing en banc, which was denied by this court.[5] The relators then petitioned for certiorari by the United States Supreme Court. The Supreme Court denied the petition.[6] Thereupon, the relators filed a petition for rehearing on certiorari, alerting the Court to the fact that, since their petition had been filed, a circuit split had developed between the Fifth, Third, and Seventh Circuits on the issue of whether local governments are amenable to suit under the FCA, citing *United States ex rel. Chandler v. Cook County*,[7] and *United States ex rel. Dunleavy v. County of Delaware*.[8] The Supreme Court denied the [relators'] petition for rehearing on certiorari and the *Garibaldi I* judgment in favor of the board became final on February 25, 2002.[9]

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[4] *Garibaldi I*, 244 F.3d 486 (5th Cir. 2001).

[5] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 264 F.3d 1143 (5th Cir. 2001).

[6] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 534 U.S. 1078 (2002).

[7] 277 F.3d 969 (7th Cir. 2002) (holding that a county is subject to liability under the FCA).

[8] 279 F.3d 219 (3d Cir. 2002) (holding that a county is not subject to liability under the FCA).

[9] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 534 U.S. 1172 (2002).

Four months later, the Supreme Court granted a writ of certiorari in *Chandler*, and on March 10, 2003, issued its decision holding that counties are subject to liability under the FCA.[10] In its opinion, the Supreme Court noted that the Seventh Circuit's decision in *Chandler*, of which the high court approved, conflicted with the opinions of two other courts of appeals, citing in a footnote the decision by this circuit in *Garibaldi I* and the decision by the Third Circuit in *Dunleavy*.[11] The Supreme Court's opinion, however, did not otherwise mention *Garibaldi I*. On April 23, 2003, the Supreme Court granted a writ of certiorari in *Dunleavy* and summarily reversed the decision by the Third Circuit and remanded for further consideration in light of *Chandler*.[12]

On May 12, 2003, the relators in the present case filed a Rule 60(b)(6) motion for relief from the final judgment entered by this court. The district court granted the motion and re-entered the plaintiffs' judgment on the verdict against the School Board. Specifically, the district court concluded that the change in decisional law effected by the Supreme Court's decision in *Chandler* created extraordinary circumstances justifying relief from this court's judgment under Rule 60(b)(6) because, among other reasons, our decision in *Garibaldi I* was an "integral part" of the Supreme Court's decision-making process. The School Board timely appealed.

Discussion

We must decide whether the Supreme Court's decision in *Chandler* combined with the facts of this case gave rise to "extraordinary circumstances" warranting the district court's exercise of its discretion under Rule 60(b)(6) to grant

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[10] *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).

[11] *Id.* at 125 n.6.

[12] *United States ex rel. Dunleavy v. County of Delaware*, 538 U.S. 918 (2003).

relief from our final judgment in *Garibaldi I*.[13] Rule 60(b)(6) authorizes a court to relieve a party from a final judgment for "any . . . reason justifying relief" other than a ground covered by clauses (b)(1) through (b)(5) of the rule.[14] Relief under this section, however, is appropriate only in an "extraordinary situation"[15] or "if extraordinary circumstances are present."[16] Moreover, "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment."[17]

In the present case, however, the district court concluded that "extraordinary circumstances" were created when the Supreme Court, in *Chandler*, held that local governments are "persons" amenable to qui tam actions under the FCA. As the district court noted, *Chandler* did more than simply announce new governing decisional law after *Garibaldi I's* finality. The Supreme Court, in affirming the decision of the Seventh Circuit, expressly stated that the Seventh Circuit's holding conflicted with *Garibaldi I* and the Third Circuit's decision in *Dunleavy*.[18] Thus, the district court reasoned, "[b]ut for *Garibaldi* [*I*], there would not have been the two to one split" giving rise to the *Chandler* "grant of writs," and "the fact that these three cases were all under

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[13] *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 849 (5th Cir. 1990) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)).

[14] *Hess v. Cockrell*, 281 F.3d 212, 215-16 (5th Cir. 2002).

[15] *Klapprott v. United States*, 335 U.S. 601, 613 (1949).

[16] *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747-48 (5th Cir. 1995) (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990)).

[17] *Bailey*, 894 F.2d at 160.

[18] *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 2003 WL 22174241, *6 n.1 (E.D. La. 2003) (citing *Chandler*, 538 U.S. at 125 n.6).

consideration at substantially the same time . . . played a role" as "an integral part" in the "[Supreme Court's] decision making process."[19] Consequently, the district court decided, this case falls within the "extraordinary circumstances" recognized by this circuit in *Batts v. Tow-Motor Forklift Co.*,[20] as justifying Rule 60(b)(6) relief when "a subsequent court decision is closely related to the case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case occurs."[21]

The present case is not atypical of the many instances in which the Supreme Court has granted certiorari and rendered a decision resolving a circuit split. Undoubtedly a large percentage of them involve most of the elements upon which the district court relied to characterize the *Chandler* decision's impact on *Garibaldi I* as one involving "extraordinary circumstances." After almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision. The differences between such cases in terms of the closeness of the relationship between the decision in the losing litigant's case and the subsequent Supreme Court decision, diligence in filing for relief from judgment, proximate causation of the circuit conflict and the like would appear to be marginal in the large majority of split resolution situations. For these reasons, we do not think the present case has any features that cause it to be exceptional to such a marked extent from other cases involving resolution of circuit conflicts as to create "extraordinary circumstances" justifying reopening of the judgment.

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[19] *Id.* at *7.

[20] 66 F.3d 743, 747 (5th Cir. 1995).

[21] *Garibaldi*, 2003 WL 22174241, *5 (quoting *Batts*, 66 F.3d at 748 n.6).

An examination of the details of the arguments for reopening the judgment, which are based upon language in *Batts*, does not persuade us either. The statement in *Batts* that relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, "such as where the Supreme Court resolves a conflict between another circuit ruling and that case,"[22] was dicta unnecessary to the *Batts* holding and so removed from its core that it may not have received the considered judgment of the whole court.[23] Furthermore, *Batts* cited the Eleventh Circuit's decision in *Ritter v. Smith*,[24] a case that, even if we were to assume or agree presented "extraordinary circumstances" under Rule 60(b)(6), is clearly distinguishable and does not persuade us that an exceptional situation prevails here.

In *Ritter*, the Supreme Court's decision in another case overruled the Eleventh Circuit's prior holding that the Alabama capital sentencing procedure was unconstitutional. The Eleventh Circuit in *Ritter* concluded that several additional factors in the case made the circumstances sufficiently extraordinary to warrant granting the State of Alabama relief under Rule 60(b)(6) from the Circuit's erroneous prior ruling of unconstitutionality and grant of habeas effectively requiring a new capital sentence hearing. The additional factors found by the court were: the circuit's previous erroneous judgment had not been executed, so that the greater concomitant interest in the finality of an executed judgment was not involved; the invalidation of the state's capital sentencing procedure and requirement of a new sentencing hearing, which had not yet occurred, had prospective effects

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[22] *Batts*, 66 F.3d at 748 n.6 (citing *Ritter v. Smith*, 811 F.2d 1398, 1402-03 [11th Cir. 1987]).

[23] *See Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002); *cf. Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

[24] 811 F.2d 1398 (11th Cir. 1987).

analogous to those of consent decrees and permanent injunctions that courts generally recognize may be modified in the light of subsequent decisional law changes; there was minimal delay between the finality of the judgment and the motion for Rule 60(b)(6) relief; the Supreme Court's supervening decision, *Baldwin v. Alabama*,[25] was rendered expressly to resolve a conflict between it and the earlier circuit decision in *Ritter*; the situation presented was analogous to that in which two cases are related, not because the Supreme Court's decision was rendered to resolve a conflict between them but because they arose out of the same factual transaction; and there were considerations of comity which argued for relieving the state from the federal declaration of unconstitutionality and writ of habeas corpus that upset the finality of a state court's judgment.[26]

Almost none of the "additional factors" in *Ritter* is present here. The considerations of comity for state laws and judicial decisions are not present in this federal question case. Because of *Dunleavy*'s conflict with *Chandler*, *Garibaldi I* was not essential to the circuit split, the grant of certiorari, or the Supreme Court's resolutory [sic] *Chandler* decision. *Garibaldi I*'s final judgment is not apt to have prospective effects analogous to those of an executory constitutional ruling affecting a state's capital sentencing procedures, a consent decree, or a permanent injunction. By the same token, *Garibaldi I*'s final judgment effectively rejecting the plaintiffs' claims with prejudice is more analogous to a fully executed judgment than to Ritter's "unexecuted" judgment;[27]

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[25] 472 U.S. 372 (1985).

[26] *Ritter*, 811 F.2d at 1401-03.

[27] Generally speaking, final civil judgments having the effect of res judicata, even if un-executed, are not voided or affected by a subsequent change in the decisional law on which they were based. *See James B. Beam Distilling Company v. Georgia*, 501 U.S. 529 (1990) ("Of course, retroactivity in civil cases must be limited by

(continued...)

and *Garibaldi I* does not arise from the same factual transaction as *Chandler*'s FCA suit against Cook County, Illinois. The single factor that *Garibaldi I* and *Ritter* have in common, minimal delay between finality and motion for relief, denotes the absence of a disqualifying factor rather than the presence of an affirmative one—and is not truly distinctive but may be present in many cases which do not call for Rule 60(b)(6) relief because extraordinary circumstances are not present.

Moreover, an extraordinary situation justifying relief from judgment is not created every time the Supreme Court lists a case as one that merely contributed to a split between circuits. This factor should not be dispositive of a Rule 60(b)(6) motion and was not, in fact, dispositive in *Ritter*. It is not extraordinary for the Supreme Court to deny certiorari in a court of appeals case that it ultimately overrules in the review of a later similar case.[28]

As this court stated in *Seven Elves Incorporated*,[29] "the discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b)(6) between the desideratum of finality and the demands of justice." We conclude that the great desirability of preserving the principle of finality of judgments preponderates heavily over any claim of injustice in this case. Dis-

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[27] (...continued)
the need for finality . . . once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.").

[28] *See, e.g., Missouri v. Seibert*, 124 S. Ct. 2601 (2004) (overturning, among others, the Ninth Circuit's decision in *United States v. Orso*, 266 F.3d 1030 (9th Cir. 2001), less than two years after denying a petition for certiorari in that case, *United States v. Orso*, 537 U.S. 828 (2002)); *Garcia v. United States*, 469 U.S. 70 (1984) (overruling, in effect, *United States v. Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975)).

[29] 635 F.2d 396, 402 (5th Cir. 1981).

turbing the sanctity of the final judgment in this case would implicate the doctrine of res judicata in many other cases in which litigants may seek to reap the benefit of a change in decisional law after the judgments against them have become final. The claim of injustice by plaintiffs is undermined by the fact that they have been treated equally with other litigants whose judgments became final shortly prior to a change in decisional law that would have benefitted them had it occurred while their cases were still open on direct review. No two cases are truly identical; however, we see no distinguishing features that make this case so exceptional as to say that it involves "extraordinary circumstances" calling for Rule 60(b)(6) relief.

For these reasons, we conclude that: the circumstances of this case do not justify the district court's use of its discretion to grant relief under Rule 60(b)(6); the district court's judgment is reversed; and the judgment of this court in *Garibaldi I* is reinstated.

It Is So Ordered.

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003 SEP 18 AM 10:20
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA ex rel. WILLIAM GARIBALDI AND CARLOS SAMUEL	**CIVIL ACTION**
	NO. 96-0464
VERSUS	**SECTION "K"**
ORLEANS PARISH SCHOOL BOARD	

ORDER AND REASONS

Before the Court is the Motion of Plaintiffs/Relators Garibaldi and Samuel on Behalf of the United States of America for Relief From Judgment under Federal Rule of Civil Procedure 60(b) (Doc. 280). The Court, having entertained oral argument and having reviewed the pleadings and relevant law, finds that because of the extraordinary circumstances surrounding this case, the motion must be granted.

Background

This matter came to trial before this Court in October of 1998. In this suit, Garibaldi, who was Director of the Audit Department of the School Board and Carlos Samuel

(referred to collectively as "Relators") sued their employer, the Orleans Parish School Board on behalf of the United States for numerous violations of the False Claims Act, 31 U.S.C. § 3729, *et seq*. After trial, a jury found that the School Board had submitted more than 1500 false claims to the federal government over the course of 11 years. On April 27, 1999, this Court entered a judgment on the verdict, with some modifications, against the School Board totaling almost $23 million.

That judgment was appealed to the Fifth Circuit. The School Board raised several issues in its appeal, including that a local government such as it may not be held liable under the False Claims Act. In their appeal, Relators argued that the district court erred in reducing the civil penalty to be paid by the School Board and that it abused its discretion in not awarding the Relators the statutory maximum share of the award payable to the United States. The United States intervened in the appeal to assert its interpretation of the False Claims Act.

The Fifth Circuit reversed this Court's judgment on March 28, 2001. *United States of America ex rel. William Garibaldi and Carlos Samuel v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001). It found that the School Board, as a local government unit, was not a "person" subject to liability under the False Claims Act. In so doing, it relied primarily on the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000). In that case, the Supreme Court found that states are not persons for purposes of the False Claims Act. Relying on the analysis found therein concerning punitive damages, the appellate court found:

> The False Claims act imposes punitive damages on those who violate it. This is contrary to the well-settled presumption that governments, including local governments, are not subject to

> punitive damages. *Stevens*, at 1869; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981). As the Supreme Court has held, imposing punitive damages on local governments is ordinarily contrary to sound public policy. *Id.* at 263, 101 S. Ct. at 2748. Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless. The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless. Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability. Extracting damages from them—damages that are far more than is needed to compensate the federal government for whatever losses it has suffered—is supported as the Supreme Court has said, by "neither reason nor justice." *Id.* at 267, 101 S. Ct. at 2748.

Garibaldi, 244 F.3d at 491-92.

In the Fifth Circuit's decision, the court noted that it could locate only two decisions (other than this Court's decision in *Garibaldi*) each of which reached opposite conclusions, those being *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078 (N.D. III. 1999), *rev'd in part*, 118 F. Supp. 2d 902 (N.D. Ill. 2000) (Cook County, Illinois is a person under the False Claims Act but found county immune as the mandatory treble damage provisions could not be imposed under *Stevens*); and *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (City of New York, New York is not a person under the False Claims Act). *Garibaldi*, 244 F.3d at 490 n.4. Thus, the appellate court was aware that there was no unanimity of opinion as to whether local governments are persons under this Act. Nonetheless, it reversed the district court's decision and vacated the district court judgment.

On September 20, 2001, Relators filed a timely Petition for Writ of Certiorari to the United States Supreme Court which was denied on January 7, 2002. Two weeks later, on January 22, 2002, the United States Court of Appeals for the Seventh Circuit distinguished *Stevens* ruling that a county was a person for purposes of the False Claims Act and thus reversed the district court finding that the county was not immune from the FCA damages scheme. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002). The Seventh Circuit thus reversed one of the very cases upon which the Fifth Circuit noted in its opinion and created unequivocally a split in the circuits.

Nine days later, on January 31, 2002, Relators filed a timely Petition for Rehearing in the United States Supreme Court demonstrating a conflict in the circuits on the basis of the decision of the Seventh Circuit in *Chandler* and the decision of the Fifth Circuit in *Garibaldi* and the Third Circuit in *Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002). The Supreme Court refused rehearing on February 25, 2002.

However, less than four months later on June 6, 2002, writs were granted by the Supreme Court in *Cook County*. Nine months after that, on March 10, 2003, the Supreme Court affirmed the Seventh Circuit ruling noting the split in the circuits, specifically citing the Fifth Circuit's decision in *Garibaldi*. In a 9 to 0 decision, based on the legislative history and the text of the statute, the Court found that municipalities were not exempted from the False Claims Act. *Cook County, Illinois v. United States ex rel. Chandler*, [538 U.S. 119, 122 (2003)]. Furthermore, it specifically rejected the argument that the punitive nature of the False Claims Act prevented its being used against a municipal corporations. It stated:

> Although we did indeed find the punitive character of the treble damages provision a reason not to read "person" in include a State, see

> [*Stevens*, 529 U.S.] at 785, it does not follow that the punitive feature has the force to show congressional intent to repeal implicitly the existing definition of that word, which included municipalities.

Cook County[, 538 U.S. at 130]. The Court also noted:

> The question in such cases is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket, a question that can be answered in any given case, not by an opportunistic *qui tam* relator, but by a combination of the judge's discretion and the Government's power to intervene and dismiss or settle and action.

[*Id.* at 132]. It continued by noting that "inferring repeal from legislative silence is hazardous at best, and error seems overwhelmingly likely in the notion that the 1986 amendments wordlessly redefined 'person' to exclude municipalities." [*Id.*]

The Supreme Court then concluded:

> The basic purpose of the 1986 amendments [which increased the penalties from double to triple damages] was to make the FCA a "more useful tool against fraud in modern times." S. Rep., at 2. Because Congress was concerned about pervasive fraud in "all Government programs," *ibid.*, it allowed private parties to sue even based on information already in the Government's possession, see *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997); increased the Government's measure of recovery; and enhanced the incentives for relators to bring suit. Yet the County urges that in so doing Congress made local governments, which today often administer or receive

> federal funds, immune not only from treble damages but from any liability whatsoever under the FCA. Congress could have done that, of course, but it makes no sense to suggest Congress did it under its breath. It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims. *See Burns v. United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L.Ed.2d 123 (1991).

Id. [at 133] (footnotes omitted).

On April 23, 2003, the United States Supreme Court granted the writ application in *United States ex rel. Dunleavy v.* [*County of*] *Delaware* and reversed the decision of the Third Circuit, 538 U.S. 918, 123 S. Ct. 1619 (2003).

On May 12, 2003, the instant motion seeking relief from judgment under Fed. R. Civ. P. 60(b) was filed.

Analysis

Rule 60(b)(6) provides that a court may act to relieve a party from final judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). While Rule 60(b) sets out five other specific bases for granting relief from a final judgment, the parties agree that the only provision applicable herein is the sixth which has been described as "a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992). However, the Fifth Circuit has "narrowly circumscribed its availability, holding that Rule 60(b)(6) relief will be granted only if extraordinary circumstances are present." *Batts v. Tow-Motor Forklift Company*, 66 F.3d 743, 747 (5th Cir. 1995), *citing Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) (affirming order denying Rule 60(b)(6) motion based on change in federal law). Indeed, the Fifth Circuit

has specifically held that changes in decisional law do not constitute the "extraordinary circumstances required for granting Rule 60(b)(6) relief." *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002), *citing Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995); *Picco v. Global Marine Drilling*, 900 F.2d 846, 851 (5th Cir. 1990); *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157 (5th Cir. 1990).

It appears that this interpretation of the rule—that is that a change in decisional law alone did not constitute grounds—was apparently first articulated in *Bailey*, as the Fifth Circuit relied upon *McKnight v. United States Steel Corp.*, 726 F.2d 333, 336 (7th Cir. 1984); *Title v. United States*, 263 F.2d 28, 31 (9th Cir. 1959). However, in *Batts*, the Fifth Circuit explained this bald statement.

In *Batts*, the Fifth Circuit was faced with a case in which a plaintiff was injured when a coworker using a forklift collided with him. The plaintiff brought a diversity action against the manufacturer of the forklift alleging negligence and strict liability based on the defective and unreasonably dangerous product and/or negligent design. Under Mississippi law, the defendants had available as a complete bar to recovery the "open and obvious defense" which defendant argued and the jury believed rendering a verdict for the defendant. Following the denial of his post-verdict motions, plaintiff appealed to the Fifth Circuit and asked the court to stay the appeal pending a decision by the Mississippi Supreme Court in which the viability of this defense was at issue. The stay was denied in June of 1991 and the Fifth Circuit affirmed the lower court ruling in 1992.

On March 25, 1993, subsequent to the issuance of the Fifth Circuit's mandate on January 4, 1993, the Mississippi Supreme Court held that the risk-utility test of products liability (which vitiated the affirmative defense) had been used in Mississippi since 1988. On April 19, 1993, Batts filed in the district court a Rule 60(b)(6) motion, urging the court on the basis of the Mississippi court decision to relieve

him from the adverse judgment. The district court granted that motion, vacated the judgment and set the matter for trial based apparently on its belief that it had improperly instructed the jury on Mississippi products liability law. The defendant appealed, and the Fifth Circuit reversed the district court.

The Fifth Circuit in so doing noted that in *Picco v. Global Marine, supra*, it had held that it was an abuse of discretion for the district court to grant relief where the Supreme Court had changed the applicable rule of law. *Id.* at 747. It also stated:

> Absent some showing of extraordinary circumstances, courts have refused to vacate their prior judgment were they correctly applied federal law, and a subsequent Supreme Court ruling changed the law. *See, e.g., Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir.) (denying Rule 60(b)(6) relief where Supreme Court reversed ruling on claims for indemnity under RICO statute after entry of final judgment), *cert. denied*, 479 U.S.885, 107 S. Ct. 277, 93 L.Ed.2d 253 (1986). A party seeking relief under Rule 60(b) cannot simply cite a new Supreme Court decision to support its motion; it must present proof that enforcement of the judgment would work an injustice. *De Filippis v. United States*, 567 F.2d 341, 344 (7th Cir. 1977), *overruled in part on other grounds by United States v. Chicago*, 663 F.2d 1354 (7th Cir. 1981). The required showing is substantial. *See Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 8 F.3d 1501, 1509 (10th Cir. 1993). Even where the judgment provides injunctive relief, and thus has an ongoing effect, courts may refuse a Rule 60(b)(6) motion founded upon the Supreme Court's announcement of a new rule of law. *Id.*

Batts, 66 F.3d at 748-49.

However, in a footnote, the Fifth Circuit specifically carved out a caveat to this apparent hard and fast rule:

> We do not hold that a change in decisional law can *never* be an extraordinary circumstance. Courts may find a special circumstance warranting relief where a change in the law affects a petition for habeas corpus, where notions of finality have no place. *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (denying relief where subsequent Supreme Court decisions indicated that change in law had not, in fact, occurred), *cert. denied*, 480 U.S. 908, 107 S. Ct. 1353, 94 L.Ed.2d 523 (1987). Relief has also been found appropriate where the erroneous judgment has not yet been executed, where an appeal or remand of the case is still pending, or the judgment is not final. *See Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (affirming district court grant of relief from judgment where Supreme Court altered law regarding arbitration of securities claims while claims were pending); *Wilson v. Al McCord, Inc.*, 858 F.2d 1469, 1478-79 (10th Cir. 1988) (vacating and remanding where change in state law while appeal was pending made it necessary for parties to develop more fully the factual record); *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985) (holding on the basis of "the unique facts of this case" that district court abused its discretion in denying Rule 60(b)(6) relief where, at time plaintiff filed motion, judgment was not final, and action of Ohio Supreme Court of reversing itself within one year was certainly unusual). **Rule 60(b)(6) may also warrant relief where the subsequent court decision is closely related to the case in question, such as where the**

> **Supreme Court resolves a conflict between another circuit ruling and that case.** *See e.g., Ritter v. Smith*, 811 F.2d 1398, 1402-03 (11th Cir.), *cert. denied*, 483 U.S. 1010, 107 S. Ct. 3242, 97 L.Ed.2d 747 (1987). Similarly, where two cases arising out of the same transaction result in conflicting judgments, relief has been found to be warranted. *See Pierce v. Cook & Co.*, 518 F.2d 720, 723 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079, 96 S. Ct. 866, 47 L.Ed.2d 89 (1976).

Batts, 66 F.3d at 748, n.6 (emphasis added).

In *Batts,* the Fifth Circuit cited the *Ritter* case in which a circuit court granted Rule 60(b)(6) relief from a final judgment. In that case, Ritter had been sentenced to death pursuant to the then-operative Alabama death penalty statute. The Eleventh Circuit held that the statutory scheme was facially unconstitutional because of its mandatory death sentence component. After *certiorari* was denied and pursuant to the mandate, the district court gave Alabama 180 days to re-sentence Ritter. Shortly after, the Supreme Court of the United States granted *certiorari* in *Baldwin v. Alabama*, 469 U.S. 1085, 105 S. Ct. 589 (1984), which concerned the identical sentencing statute. Since the state did not file a Rule 59(e) motion to alter or amend the district court's December 3, 1984 judgment in *Ritter* based on the grant of *certiorari* in *Baldwin,* the judgment was final. However, on April 14, 1985, within the 180 day period the district court had allowed for re-sentencing, the State moved for extension of time to re-sentence Ritter.

The Supreme Court decided *Baldwin* on June 17, 1985, holding that the Alabama capital sentencing procedures were not facially unconstitutional. In that opinion, the Supreme Court expressly addressed the conflict between the Eleventh Circuit opinion in *Ritter* and the Alabama Supreme Court's *Baldwin* opinion.

On September 9, 1985, the State filed a Rule 60(b)(6) motion for relief from the district court's judgment of December 3, 1984. The fundamental question before the Court was whether a supervening change in the law, could ever present a sufficient basis for Rule 60(b)(6) relief. The Court discussed the issue extensively and held that mere finality of judgment is not sufficient to thwart Rule 60(b)(6) relief under extraordinary circumstances. The court did note that the judgment was not yet executed and that there was minimal delay between the finality of the judgment and the Rule 60(b)(6) motion. The court also emphasized the close relationship between the two cases, *Baldwin* and *Ritter*, and the fact that the Supreme Court had granted *certiorari* in *Baldwin* to resolve the dispute. Indeed, the Eleventh Circuit noted a district court of New York decision, *Tsakonites v. Transpacific Carriers Corp.*, 322 F. Supp. 722 (S.D.N.Y. 1970), which the appellate court described as follows:

> [A] supervening Supreme Court decision was the basis for granting a Rule 60(b)(6) motion more than five years after the original judgment. As in the present case, the intervening Supreme Court decision was rendered expressly to resolve a conflict between the earlier decision in *Tsakonites* and another case. Because of this close connection between the two cases, the court found the circumstances sufficiently extraordinary to justify disturbing the finality of the judgment.

Ritter v. Smith, 811 F.2d 1398, 1402 (11th Cir. 1987).

Thus, the Fifth Circuit has recognized that there are exceptions to this hard and fast rule concerning finality of judgments—specifically where "a subsequent court decision is closely related to the case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case" occurs. *Batts*, 66 F.3d at 748, n.6, *citing Ritter*. Certainly, under the facts of this case, this exception applies.

The *Cook County* decision resolved a conflict between the circuits and noted specifically that this case, *Garibaldi,* was one that created the conflict.[1] It has been argued by the Orleans Parish School Board that if the Supreme Court had wanted to, it could have reversed this decision itself. However, a clear review of the chronology of this case demonstrates that:

(1) when it denied *certiorari*, the conflict on the appellate level did not exist; it was two weeks later that the Seventh Circuit created the split with its *Cook County* ruling;

(2) when the Supreme Court denied the petition for rehearing on February 24, 2002, the *Cook County* application for certiorari had not even been filed; it was filed on April 19, 2002. *Cook County, Illinois v. United States ex rel. Chandler*, 2002 WL 31966999 (Appellate Brief) (U.S. Pet. Brief Sept. 9, 2002), Brief of Petitioner (No. 01-1572);

(3) The Supreme Court specifically cited the Fifth Circuit's decision in *Garibaldi* when describing the conflict between the circuits with respect to whether a municipal corporation was a person under the False Claims Act;

(4) The Supreme Court unequivocally rejected the very basis for the Fifth Circuit's decision;

(5) The Supreme Court granted the writ application in *Dunleavy* on April 23, 2003 and reversed the decision of the Third Circuit;

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[1] Indeed the Supreme Court stated, "The Court of Appeals, in conflict with two other Circuits, distinguished *Stevens* and reversed, 277 F.3d 969 (CA.7 2002). We granted certiorari, 536 U.S. 956 (2002), and now affirm the Court of Appeals." In this sentence, the Supreme Court noted the two cases in conflict in footnote six as *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (CA3 2002); *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (CA5 2001).

(6) The instant motion was filed on May 12, 2003.

The Orleans Parish School Board argues that had the Supreme Court wanted to reverse the Fifth Circuit decision, it could have done so after the *Cook County* decision; however, that ignores the fact that the Supreme Court no longer had the mandate; it was no longer capable of curing the problem. Thus, it falls on this Court to determine whether these circumstances constitute "extraordinary" ones such that it must grant the relief sought.

While this Court understands that a simple "change in decisional law" is not enough to trigger Rule 60(b)(6), it seems unconscionable to ignore the fact that this case was an integral part in the decision making process. But for *Garibaldi,* there would not have been the two to one split upon which the Supreme Court ultimately based its grant of writs and found the very basis for the Fifth Circuit's decision to be devoid of merit. Certainly, the fact that these three cases were all under consideration at substantially the same time and played a role in the Supreme Court's decision presents proof that enforcement of the judgment would work an injustice. *De Filippis v. United States*, 567 F.2d 341, 344 (7th Cir. 1977), *overruled in part on other grounds by United States v. Chicago*, 663 F.2d 1354 (7th Cir. 1981). And further, that injustice is substantial. *See Dowell v. Board of Educ. of Oklahoma City Pub. Sch.*, 8 F.3d 1501, 1509 (10th Cir. 1993).

As the Supreme Court reasoned and as noted above,

> The question in such cases is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket, a question that can be answered in any given case, not by an opportunistic *qui tam* relator, but by a combination of the judge's discretion and the Government's power to intervene and dismiss or settle an action.

Cook County[, 538 U.S. at 132]. In this case, it would be simple serendipity that determined that the federal taxpayer was to be permanently out of pocket the funds at issue herein. This course of action cannot be countenanced in the meting out of justice. Considering how intertwined these cases were, how without *Garibaldi,* the very conflict which begot the *Cook County* decision might not have been taken up. As such, the Court finds that extraordinary circumstances exist and the motion must be granted. Indeed, this route is further supported in *Polites v. United States*, 364 U.S. 426, 433, 81 S. Ct. 202, 206 (1960), where the Supreme Court implied that relief in Rule 60(b) is not to be inflexibly withheld where there is a clear and authoritative change in governing law. Indeed, in the case *sub judice,* the issues presented were new and the law was gestating. Accordingly,

IT IS ORDERED that Motion of Plaintiffs/Relators Garibaldi and Samuel on Behalf of the United States of America for Relief From Judgment under Federal Rule of Civil Procedure 60(b) (Doc. 280) is **GRANTED** and the Amended Judgment of the Court previously entered on April 27, 1999 shall be reentered.

New Orleans, Louisiana, this 17th day of September, 2003.

/s/

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30550

United States of America, *ex rel.* William Garibaldi
and Carlos Samuel,
Plaintiffs/Appellees/Cross-Appellants,

v.

Orleans Parish School Board,
Defendant/Appellant/Cross-Appellee.

No. 99-30668

United States of America, *ex rel.* William Garibaldi
and Carlos Samuel,
Plaintiffs/Appellees,

v.

Orleans Parish School Board,
Defendant/Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

March 28, 2001

Before DAVIS AND EMILIO M. GARZA, Circuit Judges, and POGUE*, Judge.

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* Judge, U.S. Court of International Trade, sitting by designation.

W. EUGENE DAVIS, Circuit Judge:

William Garibaldi and Carlos Samuel (whom we sometimes refer to jointly as the Relators) sued their employer, the Orleans Parish School Board on behalf of the United States for numerous violations of the False Claims Act, 31 U.S.C. § 3729, *et seq*. After trial, a jury found that the School Board had submitted more than 1500 false claims to the federal government over the course of 11 years. The district court subsequently entered a judgment on the verdict against the School Board of almost $23 million. The School Board and the Relators now challenge the district court's judgment. The United States has intervened in this appeal to defend its interpretation of the False Claims Act. Because we find that a local government such as the School Board is not subject to liability under the False Claims Act, we vacate the judgment entered by the district court and render judgment for the School Board.

I.

In 1995, Garibaldi was Director of the Audit Department of the School Board and Samuel was an Auditor working under Garibaldi's direction. In that year, Samuel began an audit of the Risk Management Department of the School Board. During the audit, Samuel discovered what he thought were substantial problems in two of the programs administered by the Risk Management Department, namely the School Board's unemployment compensation insurance program and its workers' compensation insurance program.

Samuel's audit of the Risk Management Department turned up what he concluded were disproportionate allocations of the costs of unemployment compensation insurance and workers' compensation insurance to the portions of the School Board's budget financed by the federal government. In particular, Samuel discovered that the School Board was charging substantially higher rates per payroll dollar for unemployment insurance to the School Board's programs that were financed by the federal government. Samuel was

unable to find any justification for this disparity and also found that other generally accepted methods of cost allocation would charge the federal government substantially less. As for the School Board's workers' compensation insurance program, Samuel discovered that the School Board had unfairly allocated the savings it had achieved from switching to self-insurance in the early 1990s. Samuel discovered that federally financed programs paid about 25% of the cost of the School Board's workers' compensation insurance before it switched to a self-insurance program. However, the School Board never reduced the contribution of the federal government to its workers' compensation insurance program to account for the large savings it realized by switching to self-insurance.

Samuel took his findings to his supervisor Garibaldi. They prepared a report which set forth their conclusions that the allocation of premiums for the School Board's unemployment compensation and workers' compensation insurance programs was seriously flawed. They also alleged that these flaws constituted a violation of applicable federal accounting principles and the False Claims Act. The Relators sent their report to Morris Holmes, then Superintendent of the school system. Concerned with the conclusions of the report, Holmes asked the chief financial officer of the school system, James Henderson, to review the findings of the Relators. Henderson refuted every finding of the Relators and found that the accounting decisions made by the School Board were fully justified and in line with applicable federal accounting principles. Holmes then retained KPMG Peat Marwick, the School Board's longtime outside auditor, and another accounting firm, Bruno & Tervalon, to settle the dispute between the Relators and Henderson and to pass on the propriety of the School Board's accounting decisions. The two accounting firms sided with Henderson and specifically found that the School Board had never violated applicable federal accounting principles or the False Claims Act.

As a result of this dispute and the conclusions reached by the two accounting firms, the School Board fired Samuel, who was still a probationary employee, and placed Garibaldi on paid suspension pending a hearing that would allow the School Board to terminate him.

II.

Less than thirty days after Samuel was fired and Garibaldi suspended, the two Relators filed this lawsuit. Invoking the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730, they alleged, on behalf of the United States, that the School Board had submitted numerous false claims to the United States over the course of eleven years as a result of the alleged accounting improprieties recounted above. They also alleged that they had been retaliated against for bringing these improprieties to light, in violation of the protections the False Claims Act gives to whistleblowers. See 31 U.S.C. § 3730(h). The United States chose not to exercise its right granted by 31 U.S.C. § 3730(b)(4)(a) to intervene in the action and take over its prosecution, and so the Relators pressed forward on their own.

Following nine days of testimony, the jury returned its verdict in favor of the Relators. The jury found that the School Board had submitted 1570 false claims to the federal government over the course of 11 years. It found that the federal government had sustained actual damages as a result of these false claims of $7.6 million, which was the sum of $4.6 million in damages from the School Board's unemployment compensation insurance program and $3 million from the workers' compensation insurance program. The jury also found that both Samuel and Garibaldi had suffered illegal retaliation for bringing these allegations to light. It found that each had suffered damages of $65,000 for pain and suffering connected with the retaliation, and that Samuel had lost $103,000 in wages as a result of his termination.

The district court entered judgment on the basis of the findings made by the jury. It ordered the School Board to pay treble damages, per the requirements of 31 U.S.C. § 3729(a), of $22.8 million and a civil penalty of $7.85 million, which was the product of 1570 false claims and the statutory minimum penalty of $5000 per false claim. See 31 U.S.C. § 3729(a). It also awarded each of the Relators the $65,000 in damages for pain and suffering and awarded Samuel $206,000 in back wages, which was twice the actual amount of back wages per 31 U.S.C. § 3730(h).[1] As their bounty for successful prosecution of the action, the district court awarded the Relators 25% of the damages and civil penalty payable to the United States. Finally, the district court also awarded the Relators attorney's fees, expenses, and costs.

Following entry of judgment by the district court, the School Board moved for judgment as a matter of law under Fed. R. Civ. P. 50(b). The Relators moved to amend the judgment, arguing that the jury had improperly calculated the damages arising from the School Board's unemployment compensation insurance program. The Relators also moved to have their share of the award payable to the United States increased to the statutory maximum of 30%.

The district court denied all the motions. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 46 F. Supp. 2d 546 (E.D. La. 1999). However, the district court, acting sua sponte, did alter the judgment in two respects. Finding that the jury had miscalculated the amount of damages payable as a result of the School Board's workers' compensation insurance program, the district court reduced that portion of the damage award from $3 million to $2,699,952. This had the effect of reducing the treble damages to $21,899,856.

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[1] The portion of the judgment that represents damages payable directly to the Relators based on their retaliation claim has been satisfied by the School Board. Only the judgment in favor of the United States is at issue in this appeal.

The district court, acting on the authority of *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975), also reduced the civil penalty from $7.85 million to $100,000.

The School Board raises several issues in its appeal, including that a local government such as it may not be held liable under the False Claims Act. In their appeal, the Relators argue that the district court erred in reducing the civil penalty to be paid by the School Board and that it abused its discretion in not awarding the Relators the statutory maximum share of the award payable to the United States. The United States has intervened in this appeal to assert its interpretation of the False Claims Act.

III.

We begin with the issue we find dispositive, namely whether a local government such as the School Board may be held liable under the False Claims Act. The answer to this question requires us to interpret the language of a federal statute, a question of law which we review de novo. *United States v. Soape*, 169 F.3d 257, 262 (5th Cir. 1999), *cert. denied*, 527 U.S. 1011, 119 S. Ct. 2353, 144 L.Ed.2d 249 (1999).

The issue before us can be simply stated. Does the School Board qualify as, "Any person" under the False Claims Act? The False Claims Act makes, "Any person" who, inter alia, knowingly presents a false claim to the federal government for payment, liable for treble damages and a civil penalty of between $5000 and $10,000 per false claim. 31 U.S.C. § 3729(a). The School Board argues that, as a local government, it is not a person under the False Claims Act.[2] The Relators, and the United States, argue

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[2] The Orleans Parish School Board is a body corporate with the power to sue and be sued, to make contracts, to purchase and hold property and to sell property. La. Rev. Stat. Ann. § § 17:51, 17:81, 17:83, 17:87.6 (West 2000). It has the power to levy taxes on prop-

(continued...)

that the School Board is a person under the False Claims Act. The term person in the liability provisions of the False Claims Act is not defined in the statute.[3] 31 U.S.C. § 3729. The issue is one of first impression for this court, and for the courts of appeal generally. Those district courts that have considered the issue are divided. See *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 118 F. Supp. 2d 902 (N.D. Ill. 2000) (Cook County, Illinois not a person under the False Claims Act); *United States ex rel. Dunleavy v. County of Delaware*, No. CIV. A. 94-7000, 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000) (Delaware County, Pennsylvania not a person under the False Claims Act); *United States ex rel. Giles v. Sardie*, No. CV-96-2002 LGB (Rcx) (C.D. Cal. Aug. 1, 2000) (City of Los Angeles, California is a person under the False Claims Act).

In considering the issue before us, we pause first to discuss an important development in the law interpreting

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[2] (...continued)
erty within the City of New Orleans to support its operations. La. Const., art. 8, § 13. It is not an arm of, and has an identity separate and distinct from, the State of Louisiana. *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986).

[3] The Relators point to legislative history from the 1986 amendments to the False Claims Act that concludes, they argue, that local governments are persons for purposes of the False Claims Act. See S. REP. NO. 99-345, at 8, reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (stating, on the basis of the holding in *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), that local governments are persons for purposes of the False Claims Act). The problem with this legislative history is twofold. First, it cites to a case concerned with an entirely different federal statute, namely 42 U.S.C. § 1983. Second, the term person has been in the statute since it was first enacted in 1863. This report is thus post-enactment legislative history, and, "utterly irrelevant" to determining the meaning of the term person in the liability portions of the False Claims Act. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 1868 n.12, 146 L.Ed.2d 836 (2000).

the False Claims Act that occurred during the pendency of this appeal. In May of 2000 the Supreme Court decided *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L.Ed.2d 836 (2000). In *Stevens*, the Supreme Court held that states are not persons for purposes of the False Claims Act. Though Stevens does not decide the question presented by this case, the Court's reasoning does shed some light on whether local governments are persons for purposes of the False Claims Act.[4]

In *Stevens*, Jonathan Stevens sued his former employer, the Vermont Agency of Natural Resources, under the False Claims Act for allegedly overstating the amount of time some of the Agency's employees had spent on certain federally funded environmental projects. This resulted, he argued, in the federal government paying the Agency more than it was due under the various projects. The United States, as in this case, did not intervene in the action. The Agency moved to dismiss on the grounds that a state agency is not a person for purposes of the False Claims Act. The district court denied the motion and the Second Circuit affirmed. [529 U.S. at 770].

The Supreme Court began its analysis in *Stevens* with the interpretive presumption that the term person does not include the sovereign. *Id.* at [780-81]; see also *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S. Ct. 742, 85 L.Ed. 1071 (1941); *United States v. Mine Workers of America*, 330

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[4] Prior to the Supreme Court's decision in *Stevens*, we have located only two decisions (other than that by the district court in this case), both from district courts, that decided whether local governments are considered persons for purposes of the False Claims Act. These two decisions reached opposite conclusions. See *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999), *rev'd in part*, 118 F. Supp. 2d 902 (N.D. Ill. 2000) (Cook County, Illinois is a person under the False Claims Act); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (City of New York, New York is not a person under the False Claims Act).

U.S. 258, 275, 67 S. Ct. 677, 91 L.Ed. 884 (1947). The Court then looked at the details of the False Claims Act for language that tended to either undermine or reinforce the presumption that states are not included in the term person. The Court found that three features of the False Claims Act served to reinforce the presumption that states are not persons for purposes of the False Claims Act.

First, the Court noted that the civil investigative demand provisions of the False Claims Act, 31 U.S.C. § 3733, contain a definition of the term person that includes states. 31 U.S.C. § 3733(*l*)(4). The Court said that, "the presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729, . . . suggests that States are not 'persons' for purposes of qui tam liability under § 3729." *Stevens*, [529 U.S. at 784] (footnote omitted).

Second, the Court held that the treble damages provisions of the False Claims Act were, "essentially punitive in nature" and so inconsistent with the presumption against imposition of punitive damages on governmental entities. *Id.* at [784-85]. The Court held that while the double damages regime of the False Claims Act which had been in place before 1986 might have been characterized as remedial, the treble damages regime added in 1986 when Congress amended the False Claims Act is truly punitive. *Id.* at [785].

Third, the Court noted that the Program Fraud Civil Remedies Act of 1986, which is an administrative scheme very similar to the False Claims Act, contains a definition of person that does not include states. 31 U.S.C. § 3801(a)(6). The Court held that it would be anomalous to subject states to the harsh damages regime of the False Claims Act while not subjecting them to the relatively light penalties of the Program Fraud Civil Remedies Act of 1986. *Id.* at [786]. Because of the presumption that the term person does not include the sovereign, which was reinforced by the details of the statutory scheme discussed above, the Court held that states are not persons for purposes of the False Claims Act.

The holding in *Stevens* does not resolve the issue presented to us in this case, nor is much of the reasoning in the opinion particularly instructive in resolving the issue presented to us in this case. Local governments do not enjoy the same sovereign status as states. For example, sovereign immunity under the Eleventh Amendment does not extend to governmental entities which are not an arm of a state. *Alden v. Maine*, 527 U.S. 706, 756, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999). Thus, we cannot apply to the School Board the presumption that the term person does not include the sovereign. Furthermore, other federal statutes that impose liability on "persons" cover local governments but not states. See, for example, *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 683-89, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) (City of New York, New York is a person for the purposes of 42 U.S.C. § 1983); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989) (State of Michigan is not a person for the purposes of 42 U.S.C. § 1983). Nor is the Supreme Court's reasoning in *Stevens* regarding either the civil investigative demand provisions of the False Claims Act or the Program Fraud Civil Remedies Act of 1986 helpful to us in resolving the issue presented by this case given the School Board's organization as a body corporate.

However, one portion of the Supreme Court's opinion in *Stevens* does provide us with some guidance. The False Claims Act imposes punitive damages on those who violate it.[5] This is contrary to the well-settled presumption that governments, including local governments, are not subject to punitive damages. *Stevens*, [529 U.S. at 785]; *City of*

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[5] Both the Relators and the United States argue that the damages regime of the False Claims Act is not truly punitive. While decisions prior to the Supreme Court's decision in *Stevens* may have supported such an argument, the Supreme Court's decision in *Stevens* is conclusive on this point. The treble damages imposed by the False Claims Act are punitive damages. *Stevens*, [529 U.S. at 785].

Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-71, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981). As the Supreme Court has held, imposing punitive damages on local governments is ordinarily contrary to sound public policy. *Id.* at 263. Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless. The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless. Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability. Extracting damages from them—damages that are far more than is needed to compensate the federal government for whatever losses it has suffered—is supported, as the Supreme Court has said, by, "[n]either reason nor justice." *Id.* at 267.

Imposing punitive damages on a local government in favor of the federal government is especially problematic. Requiring such a transfer payment would reflect a judgment by Congress that denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury. Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act.

The Relators and the United States argue that the definition of person in 1 U.S.C. § 1 (often called the Dictionary Act), which supplies definitions of certain terms when they are otherwise undefined in the statute, requires us to define person in the liability provisions of the False Claims Act as including local governments. They argue that *Monell*, 436 U.S. at 688-89, holds exactly that. The School Board argues, on the basis of *Ngiraingas v. Sanchez*, 495 U.S. 182, 110 S. Ct. 1737, 109 L.Ed.2d 163 (1990), and the legislative history quoted therein, that the definition of person in the Dictionary Act does not include local governments. We need not, and do not, choose between these two arguments be-

cause, by its own terms, the definitions in the Dictionary Act do not apply when the context of a statute indicates that Congress intends another meaning.

In *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 113 S. Ct. 716, 121 L.Ed.2d 656 (1993), the Supreme Court held that an unincorporated association of prisoners could not proceed in forma pauperis under 28 U.S.C. § 1915.[6] The prisoners' association argued that it was a person under the in forma pauperis statute because the statute did not define the term person and the Dictionary Act encompasses associations in the term person. [506 U.S. at 197.] The Court pointed out that certain features of the in forma pauperis statute suggested that Congress did not intend to allow anyone except natural persons to proceed in forma pauperis. The Court then considered the first sentence of the Dictionary Act, which provides that its definitions apply, "unless the context indicates otherwise." 1 U.S.C. § 1. The Court concluded that the context of the statute indicated that the word person was intended to be used in a more limited sense than it was used in the Dictionary Act. The Court said that,

> [O]ne can say that "indicates" certainly imposes less of a burden than, say, "requires" or "necessitates." One can also say that this exception from the general rule would be superfluous if the context "indicate[d] otherwise" only when use of the general definition would be incongruous enough to invoke the common mandate of statutory construction to avoid absurd results. In fine, a contrary "indication" may raise a specter short of inanity, and with something less than syllogistic force.

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[6] The Court explained that the statute, which has since been amended, provided that, "a qualifying person may 'commenc[e], prosecut[e], or defen[d] . . . any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor.'" *Rowland*, 506 U.S. at 198.

Rowland, 506 U.S. at 200-01 (internal citations and footnote omitted). Thus, even if we were certain that the definition of person in the Dictionary Act includes local governments, we conclude that the punitive damages regime of the False Claims Act discussed above "indicates" a congressional intent that local governments not be subject to liability under the False Claims Act.

The United States has argued that we should vacate the punitive damage award payable by the School Board but still subject it to liability under the False Claims Act if we are troubled by the punitive damages of the False Claims Act.[7] This would require us to rewrite the statute, something we will not do. The False Claims Act already allows a reduction to double damages from treble damages in those cases where the defendant provides information to the federal government before any investigation is underway. 31 U.S.C. § 3729(a). Given that Congress has already provided for a reduction in damages in certain cases, we will not read another exception into the statute based on the identity of the defendant. Any person liable under the False Claims Act is liable, save for those exceptions enumerated in the statute, for treble damages. See also *Stevens*, [529 U.S. at 785] n.16.

We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term "person" in the liability provisions of the False Claims Act not include local governments.

IV.

Both the Relators and the United States argue that the Supreme Court's interpretation of 42 U.S.C. § 1983 and the

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[7] The Relators' bounty for successful prosecution of this action is dependent on the total amount of damages payable by the School Board. As such, they are not nearly as magnanimous as the United States and do not argue that we can reduce the damages payable by the School Board.

antitrust laws suggest the conclusion that local governments are persons for the liability portions of the False Claims Act. See *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) (42 U.S.C. § 1983); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L.Ed.2d 364 (1978) (antitrust laws). However, our reading of these cases does not change our conclusion that local governments are not persons for purposes of the False Claims Act.

In *Monell*, the Supreme Court held that local governments are persons for the purposes of 42 U.S.C. § 1983. Much of the opinion is concerned with the errors in the Court's decision in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961), which had held that local governments are not persons for the purposes of 42 U.S.C. § 1983. That discussion is not relevant to the issue presented by this case. After reviewing why *Monroe* was wrongly decided, the Court went on to conclude that local governments are persons for the purposes of 42 U.S.C. § 1983. The Court's conclusion was primarily based on the legislative history of 42 U.S.C. § 1983. Predicated on this legislative history, the Court concluded that Congress intended to craft a very broad remedy, available to all citizens whose civil rights had been violated by those acting under the color of state law. That is, Congress intended to create a broad remedial statute for violations by those acting under the color of state law. *Monell*, 436 U.S. at 685-86. More importantly, the Court concluded that the framers of 42 U.S.C. § 1983 had been especially concerned with takings of private property without just compensation by local governments. The Court said,

> Representative Bingham, for example, in discussing § 1 of the bill, explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore*, 32 U.S. 243, 7 Pet. 243, 8 L.Ed. 672 (1833), especially in mind. "In [that] case the *city* had taken private property for

> public use, without compensation . . . and there was no redress for the wrong . . . ." Globe App. 84 (emphasis added). Bingham's remarks clearly indicate his view that such takings by cities, as had occurred in *Barron*, would be redressable under § 1 of the bill.

[436 U.S.] at 686-87. Because 42 U.S.C. § 1983 targeted entities that acted under color of state law, the Court concluded that it would have been nonsensical to conclude that local governments are not persons for the purposes of 42 U.S.C. § 1983. *Id.* at 686-87.

The Court's holding in *Monell* is premised upon specific indications in the legislative history of 42 U.S.C. § 1983 that Congress intended for local governments to be within the reach of 42 U.S.C. § 1983. We find no similar indications in the legislative history of the False Claims Act. Indeed, the Supreme Court has observed that,

> As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of "stopping the massive frauds perpetrated by large [private] contractors during the Civil War." . . . Its liability provision —the precursor to today's § 3729(a)—bore no indication that States were subject to its penalties.

Stevens, [529 U.S. at 781-82] (quoting *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 46 L.Ed.2d 514 (1976) (bracketed material in original)); see also *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998). Neither the United States nor the Relators have supplied us with any authority that would show that the framers of the False Claims Act contemplated liability for local governments. Furthermore, the False Claims Act, unlike 42 U.S.C. § 1983, is not specifically targeted at those who act under color of state law. Thus, it would not be absurd, as it would be with 42 U.S.C. § 1983, to hold that local governments are not liable under the False Claims Act.

We also note that the Supreme Court, relying on the presumption that local governments are not liable for punitive damages, has held that local governments are not liable for punitive damages under 42 U.S.C. § 1983. *City of Newport*, 453 U.S. at 271.

In *City of Lafayette*, the Court was faced with the question whether it should read an implied exception into the antitrust laws for commercial activity by local governments. The Court concluded that it should not. The Court said, "The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions." *City of Lafayette*, 435 U.S. at 399. The Court also noted that, " 'Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.'" *Id.* at 398 (quoting *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553, 64 S. Ct. 1162, 88 L.Ed. 1440 (1944)). Given the fact that the antitrust laws establish such a fundamental and all-encompassing regulatory regime for commercial activity, the Court decided that it could not create an implied exclusion for local governments that go out into the marketplace and engage in this type of activity.

The Court's decision in *City of Lafayette* that local governments were subject to the antitrust laws, including liability for punitive damages, was premised on the notion that the antitrust laws were drafted with the clear purpose to reach all the nation's commercial activity. Exceptions to the antitrust laws would defeat those clear purposes. The False Claims Act and the antitrust laws are not analogous in this regard. Neither the United States nor the Relators have shown that the False Claims Act has the same broad scope as the antitrust laws. From the Supreme Court's decision in *Stevens* we know that the False Claims Act does not apply

to states. The False Claims Act was enacted to reach fraud by private government contractors. We agree with the D.C. Circuit, which said, "Even if one assumes that states commit a good deal of fraud against the federal government, it cannot seriously be argued that the very purpose of the [False Claims] Act would be thwarted if states were not liable under the [False Claims] Act." *United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 875 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202, 120 S. Ct. 2194, 147 L.Ed.2d 231 (2000). This conclusion is as applicable to local governments as it is to states.

In sum, because of the differences in scope and purpose between the False Claims Act and the antitrust laws, we are not persuaded that the Supreme Court's decision in *City of Lafayette* augurs in favor of a conclusion that local governments are persons for purposes of the False Claims Act.[8]

V.

The punitive damages regime of the False Claims Act shows a congressional intent that the False Claims Act should not be applied to local governments. There is no contrary expression of legislative intent and no purpose behind the False Claims Act that undermine that conclusion. For these reasons, we conclude that the term person in the liability provisions of the False Claims Act does not include local governments like the School Board. Therefore, the judgment of the district court is VACATED and judgment is RENDERED in favor of the Appellant, the Orleans Parish School Board.

JUDGMENT VACATED AND JUDGMENT RENDERED.

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[8] We also note that following the Supreme Court's decision in *City of Lafayette*, Congress exempted local governments from all money damages payable under the antitrust laws. See The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

APPENDIX D

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

1999 APR 27 P 2:12

LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA ex rel. WILLIAM GARIBALDI AND CARLOS SAMUEL	**CIVIL ACTION**
VERSUS	**NO. 96-0464**
ORLEANS PARISH SCHOOL BOARD	**SECTION "K"**

ORDER AND REASONS

This qui tam action was filed by William Garibaldi and Carlos Samuel ("the relators") on behalf of the United States of America ("plaintiff") against the Orleans Parish School Board ("OPSB"). The case came before the court on a trial by jury, and the jury found in favor of the relators and the United States (collectively, "plaintiffs"). Accordingly, the court entered judgment for the plaintiffs in the amount of approximately $31,000,000.

Before the court are several motions, including: (1) a Motion for Judgment as a Matter of Law, or, Alternatively, a New Trial, filed by defendant Orleans Parish School Board

(Doc. # 192), (2) a Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction, filed by defendant, OPSB (Doc. # 235); (3) a Motion to Alter or Amend the Judgment, filed by plaintiff, United States of America (Doc. # 191); (4) a Motion to Alter or Amend the Judgment, filed by the relators, William Garibaldi and Carlos Samuel (Doc. # 185); (5) Objections to Order Granting Motion for Extension of Time and Report and Recommendation, filed by defendant, OPSB (Doc. # 231); and (6) Objections to Proposed Findings, Conclusions, and Recommendation of Magistrate, filed by the relators (Doc. # 230). The court will address each motion in turn.

III. DEFENDANT ORLEANS PARISH SCHOOL BOARD'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY, A NEW TRIAL

A. APPLICABLE LEGAL STANDARDS

1. STANDARD FOR JUDGMENT AS A MATTER OF LAW

Under Rule 50 of the Federal Rules of Civil Procedure, the court must determine whether there is sufficient evidence to support the jury's verdict and in so doing all evidentiary issues are to be resolved in favor of the successful party and that party is to be given the benefit of all reasonable inferences.

As stated in the seminal case *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969), in considering a motion for judgment as a matter of law, the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable persons could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that

is, evidence of such quality and weight that reasonable and fair-minded persons in exercise of impartial judgment might reach different conclusions, the motion should be denied. *See Branch v. Chevron Int'l Oil Co.*, 681 F.2d 426, 428-29 (5th Cir. 1982).

2. STANDARD FOR MOTION FOR NEW TRIAL

The standard provided under Rule 59 of the Federal Rules of Civil Procedure to determine whether a new trial or remittitur is required is different from that of Rule 50. The rule does not specify what grounds are necessary to support such a decision; however, case law demonstrates that a new trial may be granted if the district court finds that the verdict is against the great weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course. *Smith v. Transworld Drilling*, 773 F.2d 610, 613 (5th Cir.1985). In making its determination, the lodestar is whether the verdict is against the great weight of the evidence or would result in the miscarriage of justice. Unlike a Rule 50 motion, there is no need to view the evidence in the light most favorable to the nonmoving party. C. Wright & A. Miller, *Federal Practice and Procedure*, § 2806 (2d ed.1995).

B. NO NEW EVIDENCE WAS PRESENTED AT TRIAL THAT WOULD MOVE THIS COURT TO RECONSIDER ITS RULING ON THE ISSUES RAISED BY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On September 22, 1998, this court issued a ruling denying the defendant's Motion for Summary Judgment.[1] Of its many findings, the following are relevant to the arguments raised by OPSB in its post-trial motions:

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[1] *United States of America ex. rel. William Garibaldi and Carlos Samuel v. Orleans Parish Sch. Bd.*, 21 F. Supp. 2d 607 (E.D. La. 1998).

- The court has subject matter jurisdiction over this *qui tam* action, because the information on which the action is based was not publicly disclosed prior to the relator's disclosure of it;
- Even if the information were publicly disclosed, the court still has subject matter jurisdiction over the claim, because the relators were the original source of the information;
- The relators plead the necessary elements, including *scienter*, to show fraud under the FCA; and
- The relators need not have actually filed their *qui tam* action before being terminated or suspended from their jobs in order to bring a retaliation claim under section 3730(h).

OPSB has reiterated the arguments it made in its Motion for Summary Judgment in its post-trial motions, and the court remains unpersuaded.[2] Having heard the evidence at trial, the court finds that it need not revisit the legal conclusions of its September 1998 Order and Reasons. The rest of OPSB's argument on these subjects is essentially an attempt to try its case before the judge instead of before the jury. The jury, and not the judge, is responsible for finding the facts in this case. This court finds that a reasonable jury could conclude that OPSB acted with fraudulent intent as defined by the FCA.

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[2] OPSB does add one new legal argument: it claims that the court should have applied a "clear and convincing" standard rather than a "preponderance of the evidence" standard, despite its own failure to urge this standard at trial and its own admission that the Fifth Circuit has applied a preponderance of the evidence standard in FCA cases. *United States v. Thomas*, 709 F.2d 968, 971-72 (5th Cir. 1983). The court finds that the proper standard is the "preponderance of the evidence" standard and that the court applied it correctly.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS EVIDENTIARY RULINGS

1. THE COURT PROPERLY ADMITTED DEFENDANT'S JUDICIAL ADMISSION AS TO THE NUMBER OF CLAIMS

Early on in this case, plaintiffs asked defendant, through a written interrogatory, to "state the total number of claims submitted to any federal or state agency for the special revenue fund and child nutrition fund for unemployment compensation and workers compensation for each quarter from January 1, 1986 through June 30, 1997 for the purpose of obtaining reimbursement."

In his answer to the interrogatory, Anthony Stolz, the OPSB Comptroller and the party representative at trial, provided computer print-outs of revenue postings for the time period requested, and answered that the "number of claims is equal to the number of posting designated with a 'Rev.' code." The plaintiffs used this information to create an exhibit that listed the number of receipts of federal funds for each year. *Plaintiff's Exhibit 62*. There were 1570 revenue postings in the exhibit. Mr. Stolz testified that he drew up this answer with his attorney. Defendant apparently later realized that, because the FCA penalizes each individual claim, the actual number of claims matters almost as much as the total monetary amount of those claims. At trial, defendant tried to exclude its prior interrogatory answer, and plaintiff moved for the court to consider the response a judicial admission. The court held that the response was a judicial admission under *White v. Arco/Polymers, Inc.*, 720 F.2d 1391 (5th Cir. 1983) (factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them), *citing Myers v. Manchester Insurance & Indemnity Co.*, 572 F.2d 134 (5th Cir. 1978). OPSB argues that this holding was an abuse of discretion, because the claims to which it admitted were not claims under the definition of "claim" in the False Claims Act. The court disagrees.

Only deliberate, clear, and unequivocal statements can be judicial admissions. *Matter of Corland Corp.*, 967 F.2d 1069, 1074 (5th Cir. 1992) (citing *Backar v. Western States Producing Co.*, 547 F.2d 876, 880 n.4 (5th Cir. 1977)). OPSB cites *Backar* for the principle that if the person making the admission is unaware that he is admitting liability, the admission is not a "judicial admission," and argues that, here, Stolz was unaware that he was admitting liability. The court finds *Backar* inapplicable. Stolz's admission was not the uninformed statement of a low-level employee. As the Controller of OPSB, Stolz drafted the admission with the help of his attorney. Furthermore, the statement does not admit liability: Stolz did not state that OPSB made 1570 "false claims," just that it made 1570 "claims" for worker's compensation and unemployment compensation costs. If the court were to allow the defendant to equivocate on its answers to interrogatories, the doctrine of judicial admissions would lose its meaning and effectiveness.

Defendants further argue that the response of Mr. Stolz could not be properly considered by the jury, as the substance of the response contradicts the definition of "claim" in the statute and in the federal regulations. The False Claims Act defines the term "claim" as follows:

> For the purpose of this section, a "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). In other words, the School Board made a "claim" every time it requested money from the government. It is the number of applications for funds, and not the number of coded items on each application, or the num-

ber of invoices generated by the applications, or the number of contracts the applications represent, that determines the number of claims made. *United States v. Bornstein*, 423 U.S. 303, 96 S. Ct. 523, 46 L.Ed.2d 514 (1976) (where subcontractor who made three shipments of falsely branded electron tubes to prime contractor which caused prime contractor to submit false claims to the U.S. government, using 35 separate invoices, three false claims were made); *Miller v. United States*, 213 Ct. Cl. 59, 550 F.2d 17, 23 (1977) (contractor who submitted five monthly billings to the government in which eleven invoices were enclosed made five false claims, one for each occasion on which the contractor made a request for payment); *United States v. Woodbury*, 359 F.2d 370, 378 (9th Cir. 1966) (ten false applications for reimbursement included many more false invoices, but court assessed statutory penalty based on ten claims).

The court recognizes that the FCA's method of determining the number of claims can seem somewhat arbitrary. Here, the *scienter* may have been established, or renewed, each time the School Board decided to renew its contract with UCCS, or when it decided to handle its worker's compensation program internally, knowing that this would create a surplus and that the surplus would be used solely to help the general fund. However, under the FCA, the jury was obligated to assess the number of claims using the number of times the School Board made claims, and not based on the number of times the School Board decided to make these claims. In a similar case, the United States brought an FCA action against a builder of subsidized housing. The district court assessed 76 forfeitures, one for each monthly voucher. The defendant argued that the number of forfeitures should be limited to the number of acts he committed which caused false claims to be filed. Asserting that he did but one act, inflating construction costs, that caused false claims to be filed, the builder concluded that he was liable for only one forfeiture. The court held that because the builder knowingly caused a specific number of false claims to be filed, he was liable for that number of for-

feitures. *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981). Here, the School Board is liable, not for the number of contracts it entered into with UCCS, or the number of times it agreed to participate in the three-tiered rate system, or the number of times it decided to implement an internal worker's compensation plan, but the number of times it made claims to the government that were false.

On the other hand, OPSB is not liable for each and every code on its requests to the government. For example, OPSB often filed requests for reimbursement that included codes for both worker's compensation and unemployment compensation on the same page. OPSB is liable for only one false claim per application, even if more than one account was listed on the page. As one court considering the issue explained:

> The government contends that fairness or uniformity concerns support treating each CPT code as a separate claim, arguing that "to count woodenly the number of HCFA 1500 forms submitted by the Krizeks would cede to medical practitioners full authority to control exposure to [the FCA] simply by structuring their billings in a particular manner." Precisely so. It is conduct of the medical practitioner, not the disposition of the claims by the government, that creates FCA liability.

United States v. Krizek, 111 F.3d 934, 940 (D.C. Cir. 1997). The FCA punishes those who defraud the government not by the number of contracts or coded items they submit, but by the number of actual fraudulent claims made. While this system may create somewhat arbitrary results, it is the scheme mandated by the FCA, and the court did not abuse its discretion in instructing the jury to apply the statute as written.

OPSB further argues that the jury improperly reached its determination that the 1570 claims were false because OPSB did not make each claim with the knowledge that it

was false. OPSB misunderstands the reasoning behind the FCA. The FCA does not require that the low-level accounting employee who processes accounts to have the requisite *scienter* when each claim is processed. It requires the entity, the OPSB, to have the requisite intent. If the OPSB knew that its actions would result in a number of false claims, the FCA penalizes it for each false claim. *See United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981) (claimant liable for each false claim filed, even where one act of inflating construction costs created all false claims).

2. THE COURT PROPERLY EXCLUDED THE TESTIMONY OF DEFENDANT'S EXPERTS

OPSB claims that the court abused its discretion in excluding the expert testimony of four accountants: Albert J. Richard, Alcede Tervalon, Frank T. McKune, and Christopher Polischuck. The court struck these witnesses because defendant never submitted expert reports for any of them. OPSB claims that the November 7, 1995 "External Auditor's Report" constituted the expert report of all four accountants, and that its failure to formally designate it as an "expert report" was a mere formality that did not unfairly prejudice the plaintiffs. Mr. McKune and Mr. Polischuck were not even signatories to this report, and OPSB never designated it as an expert report.

Messrs. Polischuck and McKune were designated only as expert witnesses, not as fact witnesses, and because OPSB never submitted an expert report for either of them, the court struck their testimony entirely. Messrs. Richard and Tervalon, however, were listed as both expert and fact witnesses. In an attempt to ensure that defendant, despite its laxity toward the rules and deadlines of this court, was able to put on its case, this court allowed defendant to call Richard and Tervalon as fact witnesses, and to question them about the 1995 report.

Defendant now claims that this court abused its discretion in striking Poleschuck and McKune and in limiting Richard and Tervalon's testimony to facts, because this exclusion of expert testimony "struck at the heart of the case." Specifically, defendant argues that, had it been allowed to call its expert witnesses, they would have testified that OMB Circular A-87 did not require that an actuarial report be conducted every year, as claimed by plaintiffs' experts. Defendant is correct in its observation that expert testimony was important in this trial. For this reason, counsel for defendant should have followed the rules of this court, and submitted expert reports, or designated documents revealed in discovery as expert reports, by the deadline set forth by this court. Defendant was fully aware of the deadline for submission of expert reports, because defendant moved on June 10, 1998 for an extension of the deadline, which the court granted (Doc. # 53). Defendant, however, then chose to ignore the new deadline. The court takes its pre-trial deadlines seriously. These deadlines are imposed so that each party will be treated fairly. The court is not responsible for defendant's lack of care in adhering to the deadlines ordered by the court.

That said, the court notes that it might reconsider its decision if defendant could show it had suffered unfair prejudice as a result of the court's action. Defendant, however, has failed to show that it was prejudiced in any way. The court allowed Mr. Tervalon and Mr. Richard to testify as fact witnesses about the November 1995 auditor's report that they authored, and about any opinions they rendered in that report. *The defense chose not to put Mr. Tervalon on the stand.* The court is astonished that defendant did not take the opportunity to question Mr. Tervalon as a fact witness, when, as a co-author of the report, Tervalon could have testified to the details of the report, the factual inquiry behind it, and the reasons behind its conclusions. Defendant certainly had the opportunity to question Mr. Tervalon about whether it was his understanding, when he wrote the

report, that OMB Circular A-87 did not require yearly actuarial reports.

Contrary to the allegations in defendant's post-trial motion, Mr. Richard was allowed to testify as to whether OMB Circular A-87 required yearly reports. The court was remarkably lenient with Mr. Richard's "fact" testimony, allowing him much latitude to give opinions about his report even though he had not been certified as an expert witness. Defendant suffered no prejudice from its failure to follow this court's rules and certify Richard as an expert, because the court assisted it by construing "fact" testimony very loosely.

Defendants contend that the court should have continued the trial rather than refusing to allow the defense's expert witnesses to testify. A continuance would have been grossly unfair to the plaintiffs, especially since it would have been caused solely by a lack of care and attention paid by defendant to deadlines and court rules.

D. THE RELATORS DID NOT EXERCISE THEIR PEREMPTORY CHALLENGES IN VIOLATION OF *BATSON*

A party to a civil suit may challenge another party's use of a peremptory strike that excludes a prospective juror on the basis of that juror's race. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L.Ed.2d 660 (1991); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). A party may challenge another's peremptory strike regardless of the race of the challenging party since the objection asserts the juror's equal protection rights. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991).

The Fifth Circuit has developed a three-step process for evaluating *Batson* claims. First, the complaining party must make a prima facie showing that opposing counsel has exercised a peremptory challenge on the basis of race. Once

this showing has been made, the burden shifts to the striking party to articulate a race-neutral explanation for the strike. Thereafter, the court must determine whether the *Batson* claimant has proven purposeful discrimination. *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). The district court has the discretion to fashion the procedure necessary to evaluate counsel's race-neutral explanation. *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991). The trial court's decision on the ultimate question of discriminatory intent is a finding of fact usually accorded great deference on appeal because of the inherent credibility assessment. *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality) (citing *Batson*); *United States v. Valley*, 928 F.2d 130 (5th Cir. 1991) (citing *United States v. Moreno*, 878 F.2d 817 (5th Cir.), *cert. denied*, 493 U.S. 979, 110 S. Ct. 508, 107 L.Ed.2d 510 (1989)).

In *Batson*, the Supreme Court held that determining whether a prima facie case of discrimination has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. [476 U.S. at 94-97.] Here, defendants claim that plaintiffs used their peremptory challenges to exclude African-American residents of Orleans Parish. *Batson* does not prohibit peremptory challenges based on residency in a particular county or city, unless the peremptory challenges are a proxy for race. Orleans Parish has a diverse citizenship, and residency in Orleans Parish is not a proxy for race. In this case, which required jurors to consider ruling against the Orleans Parish School Board, and thus potentially influencing the taxes on residents of Orleans Parish, residents of Orleans Parish might well have been excluded for permissible and strategically prudent reasons. The court finds that defendant cannot make out a prima facie case of discrimination based upon plaintiffs' decision to strike residents of Orleans Parish.

Defendant has, however, made out a prima facie case of discrimination based upon plaintiffs' striking of black jurors in general. Plaintiffs used their peremptory challenges to strike Toyoka Rowel, Dora Matthews, and Arthemise Williams, all black women, during voir dire. The dearth of black women on the final jury was not entirely the result of plaintiffs' peremptory strikes: the court excluded Sethany Johnson, a black resident of Orleans Parish, because of her educational commitments, and Lois Johnson, a black juror from Orleans Parish, was seated but then excused by the court because she thought she knew one of the relators, Carlos Samuel. However, plaintiffs clearly exhibited a pattern of striking black women from the jury, and the final jury panel consisted of eleven whites and one black man.

Once counsel has offered a race-neutral explanation and the trial court has ruled on the ultimate issue of intentional discrimination, the court considers only the sufficiency of the race-neutral reasons articulated by counsel. *Hernandez v. New York*, [500 U.S. at 359]. A race-neutral explanation is one "based upon something other than the race of the juror." *Clemons*, 941 F.2d at 324-25 (citing *Hernandez*). Here, the plaintiffs offer strong reasons for excluding two of the jurors: Dora Matthews was excluded because she was an employee of the Orleans Parish School Board, and Arthemise Williams was excluded because she was a friend of Everett Williams, who was Superintendent of OPSB during some of the years under investigation. The court looks more critically at the plaintiffs' striking of Toyoka Rowel, a community college student whom the plaintiffs chose to strike because of her "inexperience and youth." The Fifth Circuit, however, has previously found age and appearance to be legitimate reasons for the exercise of peremptory challenges. An explanation "need not be quantifiable" provided that the intent is not race-based. *Clemons*, 941 F.2d at 325. This circuit has also found "disinterested demeanor" and "inattentiveness" to be valid, race-neutral reasons for peremptory strikes. *See United States v. Roberts*,

913 F.2d 211 (5th Cir.1990), *cert. denied*, 500 U.S. 955, 111 S. Ct. 2264, 114 L.Ed.2d 716 (1991); *see also United States v. Melton*, 883 F.2d 336 (5th Cir.1989); *see also United States v. Lance*, 853 F.2d 1177 (5th Cir.1988). The court finds that plaintiffs' have met their burden to articulate race-neutral reasons for their strikes, as required by *Batson*.

E. THE FALSE CLAIMS ACT APPLIES TO PUBLIC ENTITIES

The False Claims Act provides that "any person" who causes false claims and reports to be presented to the United States for payment, or who forms a conspiracy to have false claims paid by the United States, will be liable for treble damages and civil penalties. 31 U.S.C. § 3729. Generally, a municipality is not deemed to be a "person" when punitive and exemplary damages are at stake. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981). However, if a statute makes clear that such an interpretation is contemplated, then such damages are permissible.

Here, the legislative history of the False Claims Act as amended in 1986 makes clear that Congress intended states and municipalities to be included in the definition of "person":

> The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broadest sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof.

S. Rep. No. 99-345, at 8 (citations omitted). The Fifth Circuit has not ruled on the question of whether the term "person" includes states or municipalities. *See, e.g., United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999) (declining to address the "person" issue). The Eighth Circuit has held that the False Claims Act contemplates claims against states, in part because of the use

of the word "person" to include states throughout different provisions of the Act. *United States of America ex. rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 875 (8th Cir. 1998); *see also United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998).[3] *Zissler* noted that states themselves have filed *qui tam* actions, even though the Act authorizes only "private persons" to enforce it. Consequently, if states believe they are "private persons" when bringing an FCA action, they should also be deemed "persons" when they are sued. *Zissler* also notes that section 3733(*l*)(4) of the FCA includes states in its definition of "person." *Id.* "Person," then, should be read to include states, and subdivisions thereof, throughout the Act.[4]

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[3] One district court came to a contradictory conclusion in which it held that a state or municipality could not be sued under the False Claims Act. *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998). The court held that because municipalities cannot be sued for punitive damages, the FCA cannot apply to municipalities. The Supreme Court, however, has held that damages under the FCA are not punitive. *United States v. Halper*, 490 U.S. 435, 446, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989) (damages under the FCA are not punitive in double jeopardy context, but remedial). While holding municipalities liable for punitive damages is contrary to public policy, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), *McGary v. City of Lafayette*, 12 Rob. 668, 677 (La. 1846), the False Claims Act was intended to be remedial, not punitive. Moreover, *Graber* may have been effectively overruled by *Stevens*.

[4] The District of Columbia Circuit recently held, contrary to *Zissler* and *Stevens*, that states are not "persons" within the meaning of the act. *United States ex rel. Long v. SCS Business & Technical Institute Inc.*, [173 F.3d 890 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000)]. The court, however, did not reach the question of whether municipalities were also non-persons under the act, and, as the court's analysis was based in large part on its concern the FCA might fail under the Eleventh Amendment if "persons" were read to include states, the analysis is not applicable here, where no such concerns exist. *See Section I(F)(2), infra.*

F. THE FALSE CLAIMS ACT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

1. THE FALSE CLAIMS ACT DOES NOT VIOLATE THE TENTH AMENDMENT

Under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amendment X. In the leading case interpreting the Tenth Amendment, the Supreme Court outlined a test for determining when the federal government impermissibly encroaches on state sovereignty. *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997). *Printz* held that provisions of the Brady Act which temporarily required the Chief Law Enforcement Officer of each local jurisdiction "to conduct background checks on prospective handgun purchases violated the Tenth Amendment because the provisions compelled the states to enact a federal law. This ruling turned on the coercive nature of the government's behavior. [521 U.S. at 933] ("[t]he Federal Government may not compel the States to enact or administer a federal regulatory program"). The *Printz* court declined to hold unconstitutional those provisions of federal regulations which require states to participate in specific activities once they have voluntarily participated in a general scheme.

Here, defendant subjected itself to regulation by the federal government when it accepted federal funds. No coercion exists where the United States subjects states to the same conditions for federal funding as other grant recipients. *Zissler*, 154 F.3d 870 (8th Cir. 1998). As the *Zissler* court explained:

> States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's shilling, they take it *cum onere* . . . . Here [under the FCA], the only cooperation asked of States is honesty, a mild re-

> quirement in light of the fact that the Tenth Amendment allows even the indirect achievement of objectives which Congress is not empowered to achieve directly, through conditional federal funding . . . a False Claims Act action against a State falls within the usual constitutional balance between the States and the Federal Government.

The United States' requirement that recipients of federal funds refrain from defrauding the government does not violate the Tenth Amendment.

2. THE OPSB IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

Under the Eleventh Amendment to the United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. A citizen, then, cannot sue a state in federal court. OPSB argues that it is entitled to Eleventh Amendment immunity because the relators, and not the United States, are the real parties in interest, and are therefore "citizens," and because the OPSB is an arm of the state.

a. Are the claims brought by "citizens"?

The Fifth Circuit has held that the Eleventh Amendment bars a *qui tam* relator's claim arising under 31 U.S.C. § 3729 *et seq.* against states and state agencies, when the United States does not intervene. *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999). The court reasoned that, where the United States declines to intervene, "it is as plain as the sun" that the "suit was not commenced by the United States and that the United States has not intervened to prosecute" the case. *Id.*

at [289]. The court also held that a *qui tam* relator's retaliatory discharge claim under 31 U.S.C. § 3730(h) was likewise barred. *Id.*

Here, the suit was brought by relators William Garibaldi and Carlos Samuel on behalf of the United States. The United States chose not to intervene in the action, and the relators nonetheless succeeded on both their retaliation claims and their False Claims Act claims. Under *Foulds*, the Eleventh Amendment clearly would have barred relators from bringing this suit if the entity they were suing was the state, because the relators are "citizens" of a state.

b. Is the Orleans Parish School Board the "state"?

The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations. *Edelman v. Jordan*, 415 U.S. 651, 667 n.12, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *see also Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S. Ct. 363, 33 L.Ed. 766 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-21, 93 S. Ct. 1785, 1799-1801, 36 L.Ed.2d 596 (1973). The court must therefore determine whether the OPSB is more like a state or more like a county.

The Supreme Court has held that the issue of whether a political subdivision it to be treated as an "arm of the State" partaking of the State's Eleventh Amendment immunity or instead as a political subdivision or municipal corporation to which Eleventh Amendment immunity does not extend depends, "at least in part, upon the nature of the entity created by state law." *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 572, 50 L.Ed.2d 471 (1977). In *Mt. Healthy*, the Court determined that the Mt. Healthy Department of Education was not entitled to Eleventh Amendment immunity. Although the school board was subject to some guidance from the State Board of Education, and received a significant

amount of money from the State, the school boards had extensive powers to issue bonds, and to levy taxes within certain restrictions of state law. 429 U.S. at 280, 97 S. Ct. at 573. The Court therefore concluded that "a local school board such as petitioner is more like a county or city than it is like an arm of the State." *Id.*

In *Minton v. St. Bernard Parish School District*, 803 F.2d 129 (5th Cir. 1986), the Fifth Circuit set out a six-factor test for determining whether a political subdivision is an "arm of the state" or merely a local independent entity:

(1) whether state statutes and case law characterize the agency as an arm of the state;

(2) the source of funds for the entity;

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to statewide, problems;

(5) whether the entity has authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Id. The *Minton* court determined that, based on these factors, parish school boards are "local independent agents not shielded by the state's Eleventh Amendment immunity." *Id.* With respect to prong one of the test, the court held that, while Louisiana courts had referred to school boards as "agencies" of the state, that this characterization did not amount to an assertion that the boards were arms of the state within the meaning of the Eleventh Amendment. The court determined that the other five factors clearly indicated that the school board was not an arm of the state: the school board had an ability to generate funds for the operation of the school district through local ad valorem taxation, the board exercised discretion in performing its functions, the board's nature was innately local, the board had authority

to sue or be sued in its own name, and the board could hold, use, or sell property as it determined necessary to fulfill its obligation to the public. *Id.* The court concluded that, based on these findings, Louisiana school boards are not "mere arms of the state" and that monetary judgments against them would not "represent indirect impositions on the state treasury interfering with the state's fiscal autonomy." *Id.* The St. Bernard Parish School Board was therefore not entitled to Eleventh Amendment immunity. *Id. See also Smith v. Concordia Parish School Board*, 387 F. Supp. 887, 891 (W.D. La. 1975) (school boards and similar autonomous political subdivisions are not the alter ego of the State, but are distinct from the standpoint of sovereign immunity); *Morgan Dallas Corp. v. Orleans Parish School Board*, 302 F. Supp. 1208 (E.D. La. 1969); *Board of Comm'rs of New Orleans v. Splendour S & E Co.*, 273 So. 2d 19 (La. 1973); *Orleans Parish School Board v. Williams*, 300 So. 2d 848 (La. Ct. App.1974).

Defendant urges that in the thirteen years since the Fifth Circuit decided *Minton*, the nature of school boards in Louisiana has changed. Specifically, OPSB argues that it now receives 60% of its funding from state sources. The *Minton* court did not set out a standard for determining how much of a school board's funding had to be locally generated. The *Minton* test requires the court consider whether the school board can generate money through local property taxes, not whether the revenue so generated is sufficient to fund the quality of education the school board deems necessary.

The other factors in the analysis mandated by *Minton* similarly remain unchanged. Louisiana school boards, including this defendant, are bodies corporate with the power to sue and be sued (L.S.A. R.S. 17:51), to make contracts (L.S.A. R.S. 17:81, 17:83), to purchase and hold property (L.S.A. R.S. 17:81), and to sell property (L.S.A. R.S. 17.87.6). The members of the board are elected from districts within the Parish. OPSB argues that because state law curtails

some activities of school board members, such as prohibiting them from endorsing other school board candidates, and setting out tenure requirements for teachers and employees, that the school board has somehow become "the state" for Eleventh Amendment purposes. But the state has always regulated political subdivisions such as local school boards in many ways. This fact does not make the school boards mere creatures of the state. The court finds that school boards in Louisiana have not so changed since *Minton* that their Eleventh Amendment status has changed. The Orleans Parish School Board is not entitled to immunity from suit under the Eleventh Amendment.

G. A PART OF THE JURY AWARD WAS INADEQUATELY SUPPORTED

OPSB argues that the jury award was inadequately supported by the evidence in two ways. First, it argues that the $4.6 million unemployment compensation award could only be based upon "speculation and guesswork." Second, it argues that the $3 million worker's compensation award was incorrect because the evidence it was based on was inaccurately calculated.

1. STANDARD FOR REMITTITUR

A Rule 59 motion, as has been filed here, is an appropriate means to challenge the size of a verdict. *Dunn v. Consolidated Rail Corp.*, 890 F. Supp. 1262 (M.D. La. 1995). A jury's assessment of damages is entitled to great deference by a reviewing court and is not to be disturbed unless it is entirely disproportionate to the injury sustained. *Id.* The extent of distortion that warrants intervention is an award so large as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicate bias, passion or other improper motive, or so clearly exceeding the amount that any reasonable person could feel the claimant is entitled to recover. *Id.* (citing *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1155 (5th Cir.1985)). Where the evidence at trial

shows a range of possible damages, the jury "enjoys substantial discretion in awarding damages within the range shown by the evidence." *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990); *see also City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322, 334 (Tex. App.1994), *cert. denied*, 516 U.S. 822, 116 S. Ct. 85, 133 L.Ed.2d 42 (1995) ("the trier of fact has the discretion to award damages within the range of the evidence presented at trial"). With this standard in mind, the court turns to the issues at hand.

2. UNEMPLOYMENT COMPENSATION AWARD

The jury calculated the United States' damages at $4.6 million dollars for amounts overcharged to the special revenue and child nutrition funds for unemployment compensation insurance. At trial, the jury was presented with several conflicting versions of how much was overcharged to these funds. For example, Plaintiff's Exhibit 45-C showed a total of $4,292,968 charged to the Special Revenue Programs for the years 1988-1994. Plaintiff's Exhibit 45-D showed a total of $1,176,647 overcharged to the Food Service Programs for the years 1987 through 1994. These numbers were obtained assuming that the special revenue programs made up an average of 8.4% of the total salaries for those years, and that the child nutrition programs made up an average of 4.3%. If the jurors were to have added these figures together, they would have come to a total of $5,469,615 overcharged for those years. There would have been two obvious problems with this figure, however. First, the figure would not have included special revenue charges for the year 1987, as these were not included in the calculations. And second, the average percentages of total salaries were merely averages, and not accurate year by year.

The jurors could have used this figure and added it to the figures shown in Plaintiff's Exhibits 40-A and 40-B, which showed the amounts overcharged by the school board for unemployment compensation for the years 1995-1997.

Exhibit 40-A shows overcharges to the special revenue programs of $1,042,508, and Exhibit 40-B shows overcharges to the child nutrition programs of $223,821. Together, then, overcharges to the federal programs for the years 1995-1997 totaled $1,266,329. If the jury had added this figure to the $5,469,615 overcharged during the other years according to Plaintiff's Exhibits 45C and 45D, it would have come up with a final figure of $6,735,944.

A second method the jurors could have used in arriving at their verdict was to look to the figures in Plaintiff's Exhibit 45-E, which purports to be a composite of all of Exhibit 45. The total difference listed by plaintiffs on that piece of evidence is $4,854,388, a number which includes $1,016,826 overcharged to the food service fund and $3,837,562 overcharged to the special revenue funds. Apparently, the conclusions reached on this table differ from those on the other components of Exhibit 45 because this table calculates the salary percentage year by year rather than by using an average for the entire period of years, and because this table included special revenue charges for the year 1987. If the jury had chosen to use this figure and added the $1,266,329 from Exhibits 40A and 40B, it would have come up with a final figure of $6,120,717.

A third document shown to the jury was the United States Department of Education Office of the Inspector General Final Audit Report, completed in January of 1998 (Plaintiff's Exhibit 30). This report included a table, showing the "amount actually charged," "reasonable charges," and "excess amount charged to the Education Department" for each year 1992 through 1996. The report concluded that the OPSB overcharged the Department of Education by $2,265,212 in unemployment compensation costs from 1992 through 1996. The report does not cover the years 1987 through 1991. OPSB has alleged that the jury merely multiplied this number by two and rounded it (as the number covered five out of ten of the years in question). The number doubled would be $4,530,424. While this calculation

may have factored into the jury deliberations, the court notes that 4,530,424 rounds to 4.5 million, not 4.6 million.

The jury, then, had at least three figures to choose from in calculating its award, once it had determined that false claims were made and that these claims were made with the necessary level of *scienter*. One set of exhibits showed losses of $6,735,944, another showed losses of $6,120,717, and yet another showed losses of $2,265,212 for only half of the years in question. An award of $4.6 million is clearly within a reasonable range based upon the evidence presented by the jury. It is possible that the jury felt that the government's lower figure was more reliable than those prepared by the relators themselves. The court need not speculate as to why the jury chose the figure of $4.6 million, as the award was clearly "within the range shown by the evidence" and not "entirely disproportionate to the injury sustained." *Neiman-Marcus*, 919 F.2d at 372; *Dunn v. Consolidated Rail Corp.*, 890 F. Supp. at 1287.

3. WORKER'S COMPENSATION

a. Arithmetic Error

The jury awarded plaintiffs $3 million in worker's compensation overcharges. At trial, plaintiffs presented a chart (Exhibit 30), which outlined the overcharges for each year and provid[ed] a total of the overcharges. The total shown by plaintiff's chart was $3,098,730. This calculation, however, was erroneous. If one were to add across the columns the amounts in the "total federal refund due" row, the total would only come to $2,699,952. The evidence presented by plaintiffs, then, actually supported a verdict of $398,778 less than what they claimed it did.

While the jury did not render a verdict exactly commensurate with the figure presented by plaintiffs ($3,098,730), the number it did decide upon ($3,000,000) was still higher than anything supported by the evidence. Accordingly, the court must remit the award to the amount actually supported by the evidence. The award for work-

er's compensation is thereby reduced from $3,000,000 to $2,699,952. Because the damages in this case were trebled as is statutorily required, this reduction will decrease [the] total verdict by $300,048 times three, for a total of $900,144.

b. Savings Due to Self-Insurance

Defendant also claims that the only year in which the general fund did not contribute to worker's compensation insurance was 1993-1994, so there was no evidence of fraud in the other fiscal years. OPSB misunderstands the jury's verdict. A finding that the worker's compensation was underfunded by the general fund does not require the plaintiffs to show that the general fund made no contribution at all; rather, it requires plaintiffs to show that the money saved by self-insuring was not properly allocated to all three funds. The plaintiffs put on evidence that when worker's compensation insurance was out-sourced, OPSB contributed approximately $4 million per year to pay for it, but once it took the operations in-house, the cost dropped dramatically, by around $1.4 million per year. This $1.4 million, then, was saved by OPSB every year that it self-insured, not just the first year. Mr. Samuel testified that the $1.4 million was automatically calculated after the first year. The jury apparently felt that OPSB had an obligation under the law to allocate this savings proportionally between the three funds, and that OPSB failed to do so. The jury could have reached this conclusion by either crediting the testimony of Mr. Samuel or by carefully studying the OPSB accounting documents presented by plaintiffs.

c. Risk Management Salary Add-Backs

OPSB's third objection to the jury's verdict regarding the worker's compensation insurance is that relators did not justify why salaries paid to risk management employees were added back into their calculation of how much OPSB saved by self-insuring. Plaintiff's Exhibit 28 shows the amount paid in risk management salaries each year, and this exhibit was constructed using the labor statistics in

Plaintiff's Exhibit 2, which were obtained directly from the OPSB in discovery.

It is arguable that, because the risk management employees worked on behalf of the entire OPSB and not just on behalf of the General Fund, only a percentage of their salaries should have been added back into the surplus calculation. But OPSB made no attempt at trial to provide the jury with an alternative means of calculating the correct amounts. OPSB presented no evidence of alternative calculations, and, in fact, never even objected to the calculations or cross-examined the witnesses who had prepared the calculations about how they had reached them. Once the jury determined that salaries should be added back into the calculation, it looked to the evidence before it and reached a reasonable conclusion based upon that evidence. It is even possible that the jury did take this issue into consideration, as its $3,000,000 verdict was less than the $3,098,730 figure presented by plaintiffs in Exhibit 28.

H. THIS COURT HAS DISCRETION TO REDUCE THE TOTAL PENALTY FOR FILING THE FALSE CLAIMS

The Fifth Circuit has held that, under the FCA:

> [T]he court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to damages to insure that the Government completely recoups its losses.

Peterson v. Weinberger, 508 F.2d 45, 55 (5th Cir. 1975). The *Peterson* case was decided when the penalty under the FCA was still $2,000 for each false claim filed. Other circuits held, contrary to *Peterson*, that the trial judge had no discretion to reduce the $2,000 penalty per claim. *See United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978) ("the forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount"); *see also United*

States v. Killough, 848 F.2d 1523 (11th Cir. 1988) (applying pre-1986 statutory limits).

In 1986, the FCA was amended, and the penalty was changed to $5,000 to $10,000 per false claim, leaving the determination of where within those figures the penalty should fall to the district judge. The legislative history indicates that Congress was concerned with preventing courts from using their discretion to impose only "nominal" damages on liable defendants:

> [The law has been amended] to raise the fixed statutory penalty for submitting a false claim from $2,000 to $10,000 . . . . The Committee reaffirms the apparent belief of the Act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving final determinations with district courts, possibly resulting in discretionary nominal payments.

S. Rep. 99-345, 99th Cong., 2d Sess. The amendment may have been an attempt to remove any discretion from the trial court judge, with the exception of deciding where within the $5,000 to $10,000 range the penalty should fall. The actual language of the statutory penalty portion of the FCA, however, did not change at all, except for the amount of the penalty, and, as is shown by the quotation above, the Committee apparently believed that it was merely "reaffirming" the rationale behind the original Act.

The Fifth Circuit has not had an opportunity to revisit its *Peterson* ruling since the 1986 amendment was passed. This court does not believe that the amendments of the FCA would change the *Peterson* court's reasoning. While it is arguable that Congress's intent was to leave no discretion to the trial judge, the Fifth Circuit has read the statute differently, and until the Fifth Circuit revisits the issue, this court considers the *Peterson* case good law in this circuit and will apply its standards to the case at hand.

Under *Peterson*, the court may exercise its discretion to insure that the penalties assessed "reflect a fair ratio to damages" and that the "Government completely recoups its losses." *Peterson*, 508 F.2d at 55. The damages should not be "excessive and out of proportion."

Here, the damages rendered by the jury on the false claims portion of the verdict totaled $7.4 million dollars. Under the False Claims Act, the court was required to award the plaintiffs treble damages, which increased the judgment to $22,800,000. In addition, after assessing 1570 claims at $5,000 each, the court added another $7,850,000, for a total of $30,650,000. The judgment, against a public school district responsible for educating children, many of them poor, is for over four times the losses actually incurred by the federal government. The court finds that this judgment, especially in light of importance of protecting the real victims of the School Board's actions—the public school children of New Orleans—is excessive. A penalty of $100,000 is an adequate forfeiture, as the automatic trebling of the verdict as prescribed in the statute has already resulted in a judgment for $15.8 million more than was actually falsely claimed by the OPSB. The court therefore reduces the amount of the statutory penalty from $7,850,000 to $100,000.

IV. MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant alleges that under the recently decided *Foulds* case, this action is barred under the Eleventh Amendment because the United States did not intervene in the cases. *Foulds,* 171 F.3d 279. As is explained in the court's ruling on the Defendant's post-trial motions, *supra* at I(F)(2)(b), the *Foulds* case is inapplicable to this case because the OPSB is not "the state." Accordingly, the motion is denied.

V. MOTION TO ALTER OR AMEND THE JUDGMENT, FILED BY PLAINTIFF, UNITED STATES OF AMERICA

Plaintiff United States has moved this court pursuant to Rule 59 of the Federal Rules of Civil Procedure to increase the jury's verdict of $4.6million for unemployment compensation insurances overcharges to $6,734,000. If the jury were to have added certain columns of Plaintiff's Exhibits 40A, 40B, 45C, and 45D, it could have reached this number. But as the court held in its ruling on defendant's motion, *supra* at I(G)(2), these were not the sole pieces of evidence before the jury, and this was certainly not the sole number the jury could have chosen. The jury decided upon a figure within the range of evidence presented to it, and the court does not find that figure unreasonable. Plaintiff's motion is accordingly denied.

VI. MOTION TO ALTER OR AMEND THE JUDGMENT, FILED BY RELATORS, WILLIAM GARIBALDI AND CARLOS SAMUEL

The relators have filed a separate motion pursuant to Rule 59, asking that the court increase their percentage of the award from 25% to 30%. The relators argue that they had to litigate this case entirely on their own, with no help from the government, and that significant stumbling blocks were thrown in their path by defendants, such as responding to discovery requests by providing boxes that contained a "hodgepodge of meaningless documents." While this litigation may have been difficult for the relators, it was no more difficult than most large-scale litigations where the subject is accounting fraud. And while it is true that the plaintiffs were unaided by the government, the 25%-30% range applied by the court already takes into account the fact that the government did not intervene (had the government intervened, the range would have been 15-25%). 31 U.S.C. § 3730. The verdict in this case was exceedingly large, and the relators were further compensated in that they were awarded additional damages and injunctive relief

for their retaliation claims against the school board. The court finds that 25% of the jury verdict of the false claims action is sufficient to compensate the relators for their efforts. Accordingly, the motion is denied.

VII. DEFENDANT'S OBJECTIONS TO ORDER GRANTING MOTION FOR EXTENSION OF TIME AND REPORT AND RECOMMENDATION

The relators filed their motion for attorney's fees after the expiration of the fourteen-day deadline set by Fed. R. Civ. P. 54(d)(2)(B) for filing such motions, but within the thirty-day deadline set by this Court's Local Rule 54.3 for filing an application for costs. After filing their motion, the relators moved for an extension for the filing deadline *nunc pro tunc*. The defendant opposed the extension, arguing that the original motion was untimely. The Magistrate Judge granted the extension, and held that the relator's motion was timely filed under *Jones v. Central Bank*, 161 F.3d 311 (5th Cir. 1998) (holding that Local Rule 54.3 is a court order satisfying the "unless" clause of Federal Rule 54(d)(2)(B), so motion for attorney fees need not be filed within 14 day limit). He held in the alternative that the motion was timely under *Romaguera v. Gegenheimer*, 162 F.3d 893, 895-96 (5th Cir. 1998), where this circuit held that, because a "key function" of Rule 54(d)(2) is to ensure that parties properly notify their opponents of attorney fee requests, and the court had already acknowledged the request in its Order and Reasons accompanying the judgment, the notice requirement was satisfied and plaintiff need not file a motion for attorney fees.

Defendant, Orleans Parish School Board ("OPSB"), has objected to the Magistrate's decision to grant plaintiffs an extension of time in which to file [their] motion for attorney's fees. The Magistrate's Order is based upon clear Fifth Circuit precedent, explained above, which the court is bound to follow. The court therefore upholds the Magistrate's Order granting the Motion for an Extension of Time.

VIII. OBJECTIONS TO PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF MAGISTRATE BY PLAINTIFFS

Following the trial, and pursuant to F.R.C.P. 54(d)(2), this court referred the plaintiffs' Motion for Attorney Fees to the Magistrate Judge assigned to this case, for adjudication pursuant to F.R.C.P. 72(b), and referred the plaintiffs' Notice of Application to Have Costs Taxed to the Clerk of Court, pursuant to Local Rule 54.3. The Magistrate Judge accordingly issued a Report and Recommendation, to which the plaintiffs have objected, and which the court now reviews.

A. "REASONABLE EXPENSES"

Plaintiffs argue that while the Magistrate Judge assessed attorney fees, he failed to consider "reasonable expenses" in his Report and Recommendation. Federal law provides for the Clerk of Court to determine the taxation of costs for the following expenses:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920. In this case, this court referred court costs to the Clerk of Court for determination, and the issue of attorney fees to the Magistrate Judge. To the degree that the "expenses" claimed by relators fall within the categories enumerated in § 1920, then, the Magistrate Judge was correct that the Clerk of Court, and not the Magistrate, should evaluate the costs. For example, the costs of depositions taken (even those taken outside this state), the transportation costs of witnesses attending out-of-state depositions, copying charges for discovery documents, and process server fees are all costs to be taxed by the Clerk of Court.

Under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, however, fees, expenses, and costs are three distinct categories. *United States ex. rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995). There may be some litigation expenses other than attorney fees for which the Clerk of Court cannot award costs. Expenses such as expert fees, attorney travel costs, and copies of charts used in trial fall into this category. Because "reasonable expenses" is listed in the FCA as compensable, the calculation of these expenses should be addressed by the Magistrate Judge in a Report and Recommendation, to be reviewed by this court.[5] When this court rendered judgment for the relators, the judgment included their "costs, reasonable expenses, and attorney's fees," but this court did not expressly refer the issue of reasonable expenses to the Magistrate Judge when it referred to him the issue of attorney fees. Accordingly,

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[5] Paralegal costs may also fall into the category of attorney's fees if the work done by the paralegal was legal work and not clerical work. *See Corman v. Lifecare Acquisitions Corp.*, 1998 U.S. Dist. LEXIS 5423, 1998 WL 185517 (N.D. Tex. 1998), *citing In re Mullins*, 84 F.3d 459, 469 (D.C. Cir. 1996). If plaintiffs demonstrated such work and it was not taken into consideration in the hearing before the Magistrate Judge, it should be considered when the Magistrate Judge considers the "reasonable expenses" of plaintiffs.

the court hereby expressly refers the matter of litigation expenses to the Magistrate Judge for further hearing under F.R.C.P. 72(b).

B. DOCUMENTATION OF HOURS SPENT

1. INVOICE OF VICTORIA L. BARTELS

The Magistrate Judge neglected to consider an invoice for the services of Victoria L. Bartels, a contract attorney. Ms. Bartels' bill was for $8,137.50, for 46.50 hours of work. The court therefore holds that an additional 46.50 hours at Ms. Bartel's lodestar rate must be factored into the calculation of attorney fees.

2. PERCENTAGE REDUCTION IN TOTAL HOURS

Plaintiffs have objected to the Magistrate Judge's reduction of their counsels' total hours by 20%. The Magistrate imposed a 10% reduction for "inadequate documentation" and another 10% reduction for lack of "billing judgment." The Magistrate did not impose these reductions based on a finding that plaintiffs had overbilled for a specific number of hours; the reductions were simply generalized penalties. The court will address each reduction in turn.

a. Inadequate Documentation.

The Magistrate reduced the relators' hours, in part, because counsel did not specify with precision the subject matter of documents they were reviewing. Given the nature of this case, and the disorganized fashion in which documents were produced to the relators, the court finds that it would be very difficult for the relators to have been more specific. Almost all of the documents were accounting reports from the school board or from their auditors, and these documents were presented to relators (and to the court) in a very disorganized manner. The task of reading these documents to figure out what they were was a job in itself, and counsels' bill should not be reduced merely because the de-

fendant's responses to discovery requests were so disorganized.

The Magistrate furthermore found that many of counsel's reasons for billing were too vague to be compensable. For example, "drafting memorandum" is not as clear as describing the particular memorandum that was being drafted. However, the court finds that while additional clarity might have been helpful, it was not necessary for relators to recover attorney fees. This was not a case with a multitude of lawyers, where costs could have been exported from other cases in an attempt by the plaintiffs to recover more than was actually necessary. Throughout this litigation, the court was impressed by the streamlined manner in which counsel for relators managed their case. The court finds that a 10% decrease in hours is not justifiable under the circumstances.

b. Billing Judgment

The Magistrate Judge also reduced the number of hours because he found some of the billings to be duplicative. For example, he noticed that both Mr. Wessel and Mr. Egan sometimes attended the same depositions, and held that billing for both attorneys would be double-counting. These depositions, however, were of the upper-management of the school board. The school board produced voluminous documents in this case, often immediately before a deposition was to be taken, and it was necessary for plaintiffs to have two lawyers present at the depositions: one to conduct the questioning, and another to handle the documents.

Similarly, the Magistrate found that Mr. Wessel's decision to bill a two-hour settlement lunch had to be discounted for the amount of time it took Wessel to eat his food. The court, however, does not think that billing this time was an abuse on the part of counsel.

The court does find merit in the Magistrate's decision to reduce the number of hours billed for work that was non-

legal, such as filing pleadings, faxing documents, and serving subpoenas. These hours are not compensable as attorney time. *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535-36 (5th Cir. 1986). These hours, however, do not amount to a 10% reduction in total hours based on lack of "billing judgment." Accordingly, the court holds that the total hours should be reduced by 2% (which comes to approximately $5,000) to account for these non-legal activities.

C. CALCULATION OF REASONABLE HOURLY RATES

The Magistrate Judge chose to apply hourly rates within the range normally charged by the plaintiffs' [counsel]. The court finds that these rates should be increased. Because the court is required when applying the *Johnson* factors to adjust the lodestar to presume that these factors were taken into account when determining an hourly rate it is crucial that the hourly rate accurately reflect the level of work required by the case. Setting the hourly rates of these attorneys in the middle of their usual range does not take into account the particular difficulty of this case. It also does not take into account the lucrative and less risky business these attorneys were precluded from accepting because of the intense and time-consuming nature of this case. The court finds that the hourly rates that should be applied to the attorneys in this case should be at the higher end of their usual ranges. Accordingly, it applies an hourly rate of $250 for the work of Mr. Wessel, $150 for the work of Mr. Egan, $150 for the work of Ms. Lagarde, and $175 for the work of Ms. Bartels.

D. THE LODESTAR

1. CALCULATION

The "lodestar" is the product obtained by multiplying the total hours worked times the reasonable hourly rates for the participating attorneys. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995), *citing Hensley*

v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983). Based on the rulings made above, the court calculates the lodestar as follows:

> 753.67 hours of work by Mr. Wessel, times $250 per hour = $188,417.50
>
> 243.25 hours of work by Mr. Egan, times $150 per hour = $36,487.50
>
> 6.65 hours of work by Ms. Lagarde, times $150 per hour = $997.50
>
> 81.5 hours of work by Ms. Bartels, times $175 per hour = $14,262.50

The total amount, then, is $240,165.00. After reducing this amount by 2% to account for the minor excesses in the billing, the amount comes to $235,361.70.

2. LODESTAR REDUCTION OR INCREASE

With respect to whether the lodestar should be reduced or increased, the court disagrees with some of the Magistrate Judge's findings. Once the lodestar is calculated, the district court may accept it as is or adjust it upward or downward, depending on the circumstances of the case. *Id.* Due to the district court's superior knowledge of the facts and the desire to avoid appellate review of factual matters, the district court has broad discretion in setting the appropriate award of attorneys' fees. *Hensley*, 461 U.S. at 436-37, 103 S. Ct. at 1941. The lodestar, however, is presumptively reasonable and should not be modified unless the case is exceptional. *See City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 2641, 120 L.Ed.2d 449 (1992); *Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993). The district court should not enhance the lodestar unless the prevailing party shows that enhancement is necessary to make the award of attorneys' fees reasonable. *Blum v. Stenson*, 465 U.S. 886, 897-98, 104 S. Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In adjusting the lodestar, the Court considers the twelve factors set out in *Johnson v. Georgia Hwy. Express, Inc.*, 488

F.2d 714, 717-19 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Since the *Johnson* holding, this analysis has been somewhat augmented and amended. For example, the Supreme Court has "barred any use of the sixth factor." *Walker v. U.S. Dept. of Housing and Urban Dev.*, 99 F.3d 761, 772 (5th Cir. 1996) (citing *Burlington*, 505 U.S. at 567); *see also Shipes v. Trinity Indus.*, 987 F.2d 311, 323 (5th Cir. 1993) (the contingent nature of a case cannot serve as a basis for enhancement of attorneys' fee). In addition, the court's application of the *Johnson* factors is limited to those factors that have not already been addressed through the court's calculation of the number of reasonable hours and the rate per attorney. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998); *Watkins*, 7 F.3d at 459. The Fifth Circuit has warned courts that the first and seventh factors are especially susceptible to "double-counting." *Walker*, 99 F.3d at 771, 772. More recently, this circuit has held that the novelty and complexity of the issues (factor two), the special skill and experience of counsel (factor three), the quality of representation (factor nine), and the results obtained from the litigation (factor eight) are presumably fully reflected in the lodestar amount. *Shipes*, 987 F.2d at 322. Finally, certain factors are especially important: the time and labor involved (factor one), the customary fee (factor five), the amount involved and result obtained (factor eight), and the experience, reputation, and ability of counsel (factor nine). *Migis*, 135 F.3d at 1047. As a result, the very factors that have been held the most important in some cases have

been held presumptively a part of the lodestar in others. "Although upward adjustments of the lodestar figure are still permissible, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (citations omitted). The court finds, contrary to the Magistrate Judge's Report and Recommendation, that this is one of those "rare" and "exceptional" cases that merits an increase in the lodestar.

a. Time and Labor Required, the Skill Requisite to Perform the Legal Service, the Preclusion of Other Employment by the Attorney due to Acceptance of the Case, Whether the Fees Charged were Customary, and the Experience, Reputation, and Ability of the Attorneys

The court agrees with the Magistrate Judge that the several *Johnson* factors listed above have already been considered in calculating the lodestar. The court therefore holds that no reduction or increase in the lodestar is warranted based on these factors. *See, e.g., Terra-Drill Partnerships Securities Litigation*, 733 F. Supp. 1127, 1130 (S.D. Tex. 1990).

b. The Novelty and Difficulty of the Questions

The Magistrate Judge held that "the legal questions involved in prosecuting this qui tam action were neither novel nor difficult." Having dealt with the legal substance of this case extensively, the court disagrees. The legal questions involved in this case were novel and challenging. The challenges were not merely the result of obstreperous counsel or complex and technical details. *See Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir. 1993) (novelty and difficulty of Title VII suit involving over 300 plaintiffs and entire spec-

trum of employment decisions did not make case "rare" or "exceptional"). Here, there was a paucity of Fifth Circuit precedent on many issues, because so few *qui tam* actions are successfully litigated past the early stages. There were many issues that were issues of first impression in this circuit. The parties and the court frequently had to look to the law of other circuits and districts, and this law was often confused and divided. This case was anything but routine and demanded the attorneys to craft arguments that invited this court, and the Fifth Circuit on appeal, to "make new law." As the *Johnson* court explained:

> Although this greater expenditure of time in research and preparation is an investment by counsel in obtaining knowledge which can be used in similar later cases, he should not be penalized for undertaking a case which may "make new law." Instead, he should be compensated for accepting the challenge.

Johnson, 488 F.2d at 718. The court did not fully compensate counsel in this case for the novelty of the issues in calculating the hourly rates for the attorneys. Accordingly, the court holds that the lodestar should be increased based on the second *Johnson* factor.

c. Whether the Fee is Fixed or Contingent

Use of this factor has been expressly disallowed by the Supreme Court. *Burlington*, 505 U.S. at 567. Accordingly, this court does not consider it.

d. Time Limitations Imposed by the Client or by the Circumstances

The court finds that the time limits in this case were not unusual. This is not a unique situation where counsel is called in at the last minute to prosecute an appeal or handle matters at a late stage. *See Johnson*, 488 F.2d at 718. The court holds that this factor does not require an increase in the lodestar.

e. The Amount Involved and Results Obtained

The Magistrate Judge acknowledged that the amount involved in this case was extraordinary and the results obtained were successful. He held, however, that this factor is generally applied when there is partial or limited success to reduce, not to enhance, a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

The *Hensley* case, however, does not mandate using this factor only in response to an attempt to reduce an award. It merely emphasizes that the factor should be used only in extraordinary circumstances. Here, such extraordinary circumstances exist. Not only did the relators' lawyers achieve an extremely successful result for their clients, obtaining a verdict of several million dollars and injunctive relief, the relators' claim accounted for only 25% of the entire verdict (exclusive of the retaliation portion). In essence, the relators' lawyers earned an enormous, multi-million dollar verdict for the United States government, for which the United States paid not one penny. The relators' attorneys will not be compensated by the United States, who chose not to intervene in the suit, and the relators will therefore bear the entire burden of paying their attorneys even though they will receive only a small portion of the judgment and will have to pay their attorneys out of this portion. The court also notes that a major piece of the relators' verdict was injunctive relief (reinstatement), a classic example of the kind of relief that mandates increasing the lodestar under factor eight. Accordingly, the court finds that factor eight requires an increase in the lodestar due to the extraordinary nature of the results achieved here.

f. The Desirability of the Case

The court agrees with the Magistrate that this case was not undesirable. To the degree that it could be considered undesirable, due to its novel and time-consuming nature, these considerations have already been covered under factor two and in the hourly rates assigned.

g. The Nature and Length of the Professional Relationship with the Client

The court agrees with the Magistrate Judge that this factor is not applicable here.

h. Awards in Similar Cases

The court has no information regarding awards in similar cases.

Based on the discussion of the twelve factors above, the court finds that the lodestar of $235,361.70 should be increased due to *Johnson* factors two and eight by a factor of 1.5. Accordingly, the court increases the lodestar from $235,361.70 to $353,042.55.

Based upon the foregoing analysis,

IT IS ORDERED that the defendant's Motion for Judgment as a Matter of Law, or, Alternatively, a New Trial is hereby **GRANTED** in part and **DENIED** in part: the court remits the jury's verdict awarding $3,000,000 in damages for overcharges to the worker's compensation fund to $2,699,952; in addition, the court reduces the statutory forfeitures assessed in this case from $7,850,000 to $100,000. The final judgment for the False Claims Act portion of the case, excluding the Retaliation claims, then, will be reduced from $30,650,000 to $22,899,856.

IT IS FURTHER ORDERED that defendant's Motion to Dismiss is hereby **DENIED**.

IT IS FURTHER ORDERED that the Motion to Alter or Amend the Judgment, filed by plaintiff, United States of America is hereby **DENIED**.

IT IS FURTHER ORDERED that the Motion to Alter or Amend the Judgment, filed by the relators, William Garibaldi and Carlos Samuel, is hereby **DENIED**.

IT IS FURTHER ORDERED that defendant's Objections to Order Granting Motion for Extension of Time and Report and Recommendation are hereby **DENIED**.

IT IS FURTHER ORDERED that upon review of the Magistrate's Report and Recommendation and the relators' Objections to Proposed Findings, Conclusions, and Recommendation of Magistrate, relators' Motion for Attorney's Fees is hereby **GRANTED** and that judgment be entered in favor of relators William Garibaldi and Carlos Samuel for attorney's fees in the amount of $353,042.55; and to the extent that "reasonable expenses" are not included in costs to be taxed by the Clerk of Court, the calculation of these expenses is hereby **REFERRED** to the Magistrate for adjudication under F.R.C.P. 72(b).

New Orleans, Louisiana, this twenty-seventh day of April, 1999.

/s/

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

No. 04-1415

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
WILLIAM GARIBALDI and CARLOS SAMUEL,

Petitioners,

v.

ORLEANS PARISH SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In absence of "extraordinary circumstances", does a change in decisional law after the finality of a judgment warrant reopening the judgment under Rule 60(b)(6)?

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REASONS FOR DENYING THE PETITION

I. The Fifth Circuit did *not* essentially rule that Rule 60(b)(6) relief can never rest on a change in decisional law, and therefore, the Fifth Circuit's decision is *not* in conflict with the decisions of other Courts of Appeals.

The Court of Appeals for the Fifth Circuit correctly reversed the District Court's decision which granted Petitioners' Rule 60(b)(6) Motion. In reversing the district court, the Fifth Circuit applied the following rule of law:

> In the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6).

See App. 2a of the Petition for Writ of Certiorari ("Petition").

The above rule of law is correct and was also correctly applied by the Fifth Circuit to the facts of *Garibaldi II*[1].

Petitioners' Writ of Certiorari stated the Question Presented as:

> Whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law – regardless of the facts and circumstances that accompany such a change.

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[1] *United States ex rel. Garibaldi v. Orleans Parish School Board,* 397 F.3d 334 (5th Cir. 2005) (hereinafter referred to as *"Garibaldi II".*)

See page i of Petition. However, the Fifth Circuit did not make such a pronouncement. To the contrary, the Fifth Circuit stated that:

> We must decide whether the Supreme Court's decision in *Chandler*[2] combined with the facts of this case gave rise to "extraordinary circumstances" warranting the district court's exercise of its discretion under Rule 60(b)(6) to grant relief from our final judgment in *Garibaldi I*.[3]

See App. 4a of the Petition.

Petitioners' assertion – that the Fifth Circuit essentially ruled that Rule 60(b)(6) relief can never rest on a change in decisional law – is simply not correct. The Fifth Circuit held that Rule 60(b)(6) relief can rest on a change in decisional law, but only if the facts of the case give rise to "extraordinary circumstances." The Fifth Circuit carefully analyzed the facts of *Garibaldi II* and found that extraordinary circumstances were not present.

In determining that *Garibaldi II* did not present extraordinary circumstances, the Fifth Circuit stated that:

> The circumstances here are not "extraordinary" because this case is not materially distinguishable from the "ordinary" case in which a subsequent

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[2] *Cook County v. United States, ex rel. Chandler*, 538 U.S.119, 123. S. Ct. 1239, 155 L. Ed. 2d 247 (2003).

[3] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001) (hereinafter referred to as "*Garibaldi I*".)

> change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

See App. 2a of the Petition.

As noted by the Fifth Circuit:

> The discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b)(6) between the desideratum of finality and the demands of justice.

See App. 9a of the Petition.

Accordingly, the Fifth Circuit concluded that:

> The circumstances of this case do not justify the district court's use of its discretion to grant relief under Rule 60(b)(6).

See App. 10a of the Petition.

Undoubtedly, the discretion to grant a Rule 60(b)(6) Motion, first requires that "extraordinary circumstances" be present. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847,864 (1988). The party seeking the relief must persuade the court that the circumstances are sufficiently "extraordinary" to warrant relief. Only after proving that "extraordinary circumstances" exist, can the decision to grant the relief become a matter of the trial court's sound discretion. *Booker v. Singletary*, 90 F.3d 440, 35 Fed.R.Serv.3d 983 (11th Cir. 1996).

In *Garibaldi II,* the Fifth Circuit found that there were no extraordinary circumstances present, and therefore, there was no need to consider whether the district court abused its discretion. In other words, since there were no extraordinary circumstances present, the district court obviously abused its discretion.

Before a district court can invoke its discretion to grant or deny Rule 60(b)(6) relief, there must first be extraordinary circumstances present. *Stradley v. Cortez* 518 F.2d 488, 495 (3d Cir. 1975) (exceptional circumstances are a prerequisite for relief under Rule 60(b)(6)). "Despite the 'broad' discretion that courts enjoy to grant relief under Rule 60(b)(6), such relief is warranted 'only in exceptional or extraordinary circumstances.'" *Johnson v. Unknown Dellatifa,* 357 F.3d 539, 543 (6th Cir. 2004).

> Absent extraordinary circumstances . . . , it is certainly a proper use of a district court's discretion to invoke the strong policy favoring the finality of judgments.

Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc. 131 F.3d 625, 630 (7th Cir. 1997). Stated another way, absent extraordinary circumstances, it is *not* proper use of a district court's discretion grant Rule 60(b)(6) relief.

Accordingly, the Fifth Circuit did *not* rule that Rule 60(b)(6) relief can never rest on a change in decisional law.

Furthermore, in order to assert sufficient grounds for this Court to consider the Writ of Certiorari, the Petitioners' need to show that *Garibaldi II* is in conflict with decisions of other

Courts of Appeal. By misstating the actual holding of the Fifth Circuit' decision in *Garibaldi II*, the Petitioners have manufactured an alleged conflict between *Garibaldi II* and the decisions of other Courts of Appeals, namely *Ritter v. Smith*[4] and *Pierce v. Cook & Co.*[5]

In the case at bar, the Fifth Circuit did not hold that a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law. Consistent with the rule of law stated in *Liljeberg*, *Ritter* and *Pierce*, the Fifth Circuit held that a district court does have discretion to grant Rule 60(b)(6) relief based upon a change in decisional law, but only if "extraordinary circumstances" are present.

The cases of *Ritter v. Smith* and *Pierce v. Cook & Co.* are discussed below and are clearly distinguishable from *Garibaldi II*.

A. The Fifth Circuit's decision in *Garibaldi II* is consistent with the Eleventh Circuit's Decision in *Ritter v. Smith.*

Garibaldi II is not in conflict with *Ritter v. Smith.* The Eleventh Circuit case of *Ritter,* 811 F.2d 1398 (11th Cir.), *cert. denied,* 483 U.S. 1010 (1987) concerned the constitutionality of Alabama's death penalty statute. After receiving a sentence of death, Ritter, brought a constitutional challenge to Alabama's death penalty statute. In its first

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[4] *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), *cert. denied*, 483 U.S. 1010, 107 S. Ct. 3242, 97 L. Ed. 2d 747 (1987).

[5] *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 723 (10th Cir. 1975).

review of the case, the United States Court of Appeals for the Eleventh Circuit ruled that the statutory scheme as it appeared at that time was facially unconstitutional, and ordered that Alabama re-sentence the defendant within 180 days. *Ritter v. Smith,* 726 F.2d 1505, 1515-1517, *cert. denied*, 469 U.S. 869, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984). Just one week later, the United States Supreme Court granted *certiorari*[6] to consider the same issue in a different case[7], wherein the Supreme Court of Alabama disagreed with the Eleventh Circuit and ruled that the death penalty statute was constitutional.

Certiorari was granted by U.S. Supreme Court. It is extremely significant that this Court noted the conflict between *Ritter v. Smith* and *Ex Parte Baldwin*, and then expressly stated that it had "granted certiorari to resolve this significant conflict." *Baldwin v. Alabama*, at 374.

Given this, the State of Alabama requested that the time for re-sentencing the defendant in *Ritter* be extended until the U.S. Supreme Court ruled in the *Baldwin* matter. The request for the sentencing delay was granted.

In *Baldwin v. Alabama*, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985), the United States Supreme Court found that the Alabama statute was constitutional.

Shortly thereafter, and before the period for Ritter's re-sentencing had expired, the State of Alabama filed its 60(b)(6)

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[6] *Baldwin v. Alabama*, 469 U.S. 1085, 105 S. Ct. 589, 83 L. Ed. 2d 699 (1984).

[7] *Ex parte Baldwin,* 456 So.2d 129 (1984).

motion in *Ritter* seeking to re-instate its death penalty verdict in light of the Supreme Court's ruling in *Baldwin*. When considering the Rule 60(b)(6) motion, the Eleventh Circuit faced a set of circumstances even it regarded as "rare." *Ritter v. Smith*, 811 F.2d at 1399. Thus, the Eleventh granted the 60(b)(6) Motion and reinstated the death penalty. In doing so, the Eleventh Circuit stated that the mere change in decisional law by the Supreme Court was not sufficient to support the 60(b)(6) motion. The Eleventh Circuit in *Ritter* required and found extraordinary circumstances:

> Our investigation thus leads us to conclude that something more than a "mere" change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. Several factors in this case, in addition to the fact of the change in the law, persuade us that the circumstances are sufficiently extraordinary to warrant relief under Rule 60(b)(6).

Id. at 1401.

The Eleventh Circuit in *Ritter v. Smith* found that several other factors, along with a change in decisional law, presented the extraordinary circumstances which warranted the Rule 60(b)(6) relief. Those additional factors creating the extraordinary circumstances in *Ritter* included:

1) the previous erroneous judgment declaring the death penalty statute unconstitutional and the re-sentencing of Ritter had not been executed, so that the greater concomitant interest in the finality of an executed judgment was not involved. *Id.*, at 1401. That

is, the underlying case (the Alabama death penalty imposition in *Ritter*) was still procedurally alive, due to the pending re-sentencing, when the change in decisional law (by the Supreme Court in *Baldwin*) had occurred;

2) the invalidation of the state's capital sentencing procedure and the requirement of a new sentencing hearing, which had not yet occurred. The Eleventh Circuit acknowledged that Ritter was never fully relieved of the possibility of the death penalty because re-sentencing had not yet occurred; *Id.* at 1404-1405.

3) the Supreme Court's supervening decision, *Baldwin v. Alabama*[8], was rendered expressly to resolve a conflict between it and the earlier circuit decision in *Ritter.* That is, the Eleventh Circuit noted the close relationship between the *Ritter* case, and the *Baldwin* case. That relationship existed because the Supreme Court expressly stated in *Baldwin* that it had accepted writs in order to resolve the controversy established by the Eleventh Circuit's decision in *Ritter*[9];

4) the situation presented was analogous to that in which two cases are related, not because

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[8] 472 U.S. 372 (1985).

[9] *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

the Supreme Court's decision was rendered to resolve a conflict between them, but because they arose out of the same factual transaction; and

5) there were considerations of comity which argued for relieving the state from the federal declaration of unconstitutionality and writ of habeas corpus that upset the finality of a state court's judgment. *Ritter,* 811 F.2d at 1401-03.

The Fifth Circuit correctly distinguished the "rare" circumstances of *Ritter* from *Garibaldi II* and found that almost none of the above factors in *Ritter* were present in *Garibaldi II*:

1) *Garibaldi I*'s judgment was final. To put it more bluntly, the case of *Ritter* was still very much alive, and *Garibaldi I* was dead;

2) *Garibaldi I's* final judgment does not have prospective effects, unlike *Ritter* who had not yet been sentenced and who still required a sentencing hearing;

3) *Garibaldi I* did not cause a split in the circuits, but rather the Third Circuit case of *Dunleavy*[10] and the Seventh Circuit case of *Chandler v. Cook County*[11] caused the

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[10] *Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002) (held that a "county" *was not* a person under the False Claims Act.)

[11] *Cook County v. United States, ex rel. Chandler*, 277 F.3d 696 (7th 2002) (held that a "county" *was* a person under the False Claims Act.)

split on the status of "counties," while *Garibaldi I* specifically concerned "school boards";

4) *Garibaldi I* does not arise from the same factual transaction as the Supreme Court case of *Chandler v. Cook County.*[12] *Chandler v. Cook County* concerned the status of "counties," while *Garibaldi I* concerned "school boards;" *See* App. 8a-9a of the Petition; and

5) *Garibaldi II* does not involve considerations of comity for state laws and federal decisions, and Petitioners agree. *See* pp. 11-12 of the Petition.

According to the Fifth Circuit, *Garibaldi I* was not an "integral part" of the Supreme Court's decision-making process in *Chandler v. Cook County*. In fact, in *Chandler v. Cook County,* the Supreme Court only cited *Garibaldi I* in a single footnote, with no discussion, and the Supreme Court's opinion did not otherwise mention *Garibaldi I.* Furthermore, the Supreme Court did not overrule *Garibaldi I.*

The Fifth Circuit held that:

> An extraordinary situation justifying relief from judgment is not created every time the Supreme Court lists a case as one that merely contributed to a split between circuits. This factor should not

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[12] *Cook County v. United States, ex rel. Chandler*, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003).

> be dispositive of a Rule 60(b)(6) motion and was not, in fact, dispositive in *Ritter*. It is not extraordinary for the Supreme Court to deny certiorari in a court of appeals case that it ultimately overrules in the review of a later similar case.

See App. 9a of the Petition.

Consequently, *Garibaldi I* did not cause a "two to one split" giving rise to *Chandler.* It was the Third Circuit's decision in *Dunleavy v. County of Delaware* which was in direct conflict with the Seventh Circuit's decision in *Chandler v. Cook County,* and therefore, *Dunleavy* played the integral role in the Supreme Court's decision making process.

In disagreeing with the district court's assessment that extraordinary circumstances were present in *Garibaldi II*, the Fifth Circuit stated that:

> After almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision. The differences between such cases in terms of the closeness of the relationship between the decision in the losing litigant's case and the subsequent Supreme Court decision, diligence in filing for relief from judgment, proximate causation of the circuit conflict and the like would appear to be marginal in the large majority of split resolution situations. For these reasons, we do not think the present case

> has any features that cause it to be exceptional to such a marked extent from other cases involving resolution of circuit conflicts as to create 'extraordinary circumstances' justifying reopening of the judgment.

See App. 6a of the Petition.

Just like *Garibaldi II,* the case of *Ritter* held that something more than a change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. The Firth Circuit's holding is consistent with *Ritter*. *Garibaldi II* and *Ritter* clearly applied the same law, *i.e.,* a change in the law alone is not an extraordinary circumstance which justifies relief from a final judgment. However, due to the unique and specific facts of the capital punishment case of *Ritter,* the Eleventh Circuit found extraordinary circumstances were present which warranted Rule 60(b)(6) relief.

B. The Fifth Circuit's decision in *Garibaldi II* is consistent with the Tenth Circuit's Decision in *Pierce v. Cook & Co.*

Pierce v. Cook & Co., 518 F.2d 720, 723 (10th Cir.1975) is not at all applicable to *Garibaldi II.* The case of *Pierce* held that where two cases arising out of the same motor vehicle accident resulted in conflicting judgments between a federal court and a state court, Rule 60(b)(6) relief was warranted. *Garibaldi II* certainly did not involve divergent results in federal and state courts arising from the same transaction or occurrence.

Pierce v. Cook & Co. applied the following rule of law:

> (1) in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice, and (2) (a) change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief.

Pierce v. Cook & Co., Inc., 518 F.2d 720, 723 (10th Cir. 1975), citing *Collins v. City of Wichita, Kansas*, 254 F.2d 837, 839 (10th Cir. 1955).

The Tenth Circuit in *Pierce* held that the specific facts of the case presented extraordinary circumstances which justified Rule 60(b)(6) relief. In *Pierce,* the same vehicular accident produced divergent results in federal and state courts. Factually, a Cook & Company truck collide with a car driven by Mr. Pierce. Mr. Pierce was killed and the passengers in his car were injured. Mr. Pierce's surviving widow brought suit which was heard in federal court after being removed from state court based upon diversity jurisdiction. The suit by the guest-passengers was heard in state court.

The federal district court granted Cook & Company summary judgment on the ground that under the Oklahoma decision in *Marion Machine, Foundry & Supply Co. v. Duncan*, 187 Okl. 160, 101 P.2d 813, the shipper, Cook, as a matter of law, could not be liable for the torts of its independent contractor, the driver of the truck. The Tenth Circuit affirmed that decision.

In the state court action, the Oklahoma state court also granted summary judgment for Cook on the basis of the *Marion Machine* decision. However, the case then went to the Oklahoma Supreme Court which specifically overruled *Marion Machine* and held the shipper, Cook, could be liable for the torts of its independent contractor, the driver of the truck.

The Tenth Circuit decision became final in January, 1971. The Oklahoma Supreme Court decision became final in May, 1974. In November, 1974, Mrs. Pierce filed a Rule 60(b) motion for relief from her judgment.

In granting the Rule 60(b)(6) relief, the Tenth Circuit stated:

> In diversity jurisdiction cases, the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence. Here they were not. The unusual combination of events which have occurred make the situation extraordinary. The federal courts in which plaintiffs were forced to litigate have given them substantially different treatment than that received in state court by another injured in the same accident. The outcome determination principle mandated by *Erie v. Tompkins* [13] has been violated. Relief under Rule 60(b)(6) "is appropriate to accomplish justice" in an extraordinary situation.

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[13] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74-75, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Just like *Garibaldi II, Pierce* held that something more than a change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. However, due to the unique and specific facts of *Pierce*, *Garibaldi II* and *Pierce* reached different results.

Different cases which apply the same law to their own set of unique facts may reach different results. In such an instance, this does not constitute a conflict for purposes of granting certiorari. In particular, *Garibaldi II, Ritter* and *Pierce* all clearly applied the same law, but due to the unique facts of each case, *Garibaldi II* reached a different result than *Ritter* and *Pierce*. Accordingly, there is no conflict, and this Honorable Court should deny the Petition for Writ of Certiorari.

II. The lower courts do not exhibit confusion as to the authority of the District Courts to grant Rule 60(b)(6) relief based on a change in the decisional law.

The Petitioners further attempt to support their Writ by alleging that there is confusion among the lower courts with respect to the district court's authority to grant Rule 60(b)(6) relief. However, the cases cited by Petitioners are completely inapplicable to the facts and circumstances of *Garibaldi II*. When the Petitioners allege there is confusion among the lower courts, the Petitioners are not comparing similar cases. The Petitioners are mixing apples with oranges in order to create confusion where it does not exist.

The following cases were cited by Petitioners to purportedly demonstrate confusion exhibited by the lower courts. The alleged confusion, if any, only exists because the

cases cited by Petitioner are dissimilar and each concern uniquely different issues and facts.

Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc. 131 F.3d 625 (7th Cir. 1997) concerned different results between a federal court decision and a subsequent state court decision. A federal court judgment held that under Indiana law the term "sudden and accidental," as it is used in insurance, would exclude pollution coverage. Thus, coverage was excluded by the federal court and that judgment was final. However, over a year and a half later, the Indiana Supreme Court held that the words "sudden and accidental" in the pollution exclusion clause would not exclude pollution coverage. Rule 60(b)(6) relief was denied. The Court held that there were no extraordinary circumstances, but only a subsequent change in decisional state law – unlike, *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 723 (10th Cir. 1975) where the federal court and state court produced different results arising from the same exact accident.

DeWeerth v. Baldinger, 38 F.3d 1266, 1272-73 (2d Cir. 1994) also concerned different results between a federal court decision and a subsequent state court decision. A federal court judgment held that under New York law, the statute of limitations applicable to an action to recover stolen property required a showing of reasonable diligence in locating stolen property. Three years later, a decision by the New York Court of Appeals held that the statute of limitations applicable to this action did not require a showing of reasonable diligence in locating stolen property. Rule 60(b)(6) relief was denied. Again, the Court held that there were no extraordinary circumstances, but only a subsequent change in decisional state law.

Marrero Pichardo v. Ashcroft, 374 F.3d 46 (2d Cir. 2004) concerned the deportation of an alien and his incompetent attorney who failed to raise the change in the law which was pending while the original case was still proceeding. Pichardo was going to be deported based upon a prior driving under the influence (DUI) conviction. However, at the time his petition for writ of habeas corpus was pending, a dramatic change to governing law occurred. A change in case law after his deportation order became final, but while his petition for writ of habeas corpus was pending, made deportations based upon DUI convictions invalid. The Second Circuit granted Rule 60(b)(6) relief based upon the district court's failure to reconsider Pichardo's order of deportation once it was made aware of such an important fact, which in large part was due to incompetent lawyering. Thus, extraordinary circumstances were present.

Tonya K. v. Board of Educ., 847 F.2d 1243, 1247-48 (7th Cir. 1988), is not really a Rule 60(b)(6) case, but rather it concerns the application of a retroactive statute which would allow Plaintiff to reopen her case. The case involved the attorney fees' retroactivity provision of the Handicapped Children's Protection Act. The Seventh Circuit affirmed the district court's grant of Rule 60(b) relief reopening the case for a determination of fees, because it interpreted the statutory provision to be a mere "invitation" by Congress to the courts to reconsider the issue. *Id.* at 1247. The amended statute made attorneys' fees available to litigants prevailing under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1411-20, if the cases were pending on July 4, 1984. The Seventh Circuit held that the Plaintiffs' claim for attorney fees was pending on July 4, 1984.

Norgaard v. DePuy Orthopaedics, Inc. 121 F.3d 1074, 1077 (7th Cir. 1997) concerned a Plaintiff's decision not to appeal her case when the Supreme Court was considering the same issue in another case. An artificial hip recipient failed to appeal the court's adverse decision which held that Medical Device Amendments preempted her state common law claim against manufacturer and designer of her hip, which was sold as "investigational device." Two months after that adverse decision, the Supreme Court's decision in *Medtronic*[14] held that the Act's preemption does not apply to certain class of cases. In denying the Rule 60(b)(6) relief, the Seventh Circuit held that Norgaard could have, but did not, present the same arguments advanced by plaintiffs in *Medtronic*, and her decision not to appeal ended the case.

Polites v. United States, 364 U.S. 426, 427, 81 S. Ct. 202, 203-204 (1960) also concerned a party who failed to appeal his adverse judgment. His involved the revocation of his citizenship and a judgment of denaturalization. An appeal from that judgment was docketed. However, the Plaintiff voluntarily dismissed his appeal with prejudice. Four years later the petitioner moved to vacate the judgment of denaturalization based upon a subsequent change in decisional law. The Supreme Court raised the possibility of reopening a final judgment based upon a clear and authoritative intervening change in the law, but the alleged intervening decisions relied up by Polites were not effective to alter the law controlling the Plaintiff's case.

Plaut v. Spendthrift Farm, Inc. 514 U.S. 211, 115 S. Ct. 1447 (1995) involved the violation of constitutional

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[14] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

separation of powers principles when Congress amended the law and instructed the federal courts to reopen final judgments. The Securities Exchange Act § 27A(b) provided that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991. The Supreme Court held that the statute violated constitutional separation of powers principles by instructing the federal courts to reopen final judgments. Thus, the judicial decision becomes the last word with regard to particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what court said it was.

Accordingly, there is no confusion among the lower courts, and the above cases cited by Petitioners are clearly distinguishable from *Garibaldi II*. Accordingly, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

This Honorable Court should deny the Petition for a Writ of Certiorari in *Garibaldi II* because the Fifth Circuit's decision does not conflict with the decisions of other Courts of Appeal.

"Litigation must end some time, and the fact that a court may have made a mistake in the law, when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." *Ritter*, 811 F.2d at 1401, *citing Collins v. City of Wichita,* 254 F.2d 837, 839 (10th Cir. 1958) *Id.* at 839; *see also McKnight v. United States Steel Corp.*, 726 F.2d 333

(7th Cir. 1984); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982); *Lubben v. Selective Service System Local Board,* 453 F.2d 645 (1st Cir. 1972); *Title v. United States,* 263 F.2d 28 (9th Cir.), *cert. denied,* 359 U.S. 989, 79 S. Ct. 1118, 3 L. Ed. 2d 978 (1959); *Berryhill v. United States,* 199 F.2d 217 (6th Cir. 1952); *Loucke v. United States,* 21 F.R.D. 305 (S.D.N.Y. 1957).

A contrary rule would allow endless litigation limited only by the longevity of the previous parties, or their heirs and assigns. Indeed, the Petitioners desire an open-ended interpretation of Rule 60(b)(6) so that parties may be encouraged to seek redress thirty years after a judgment has been made final, based only on a change of heart and the mere presumption that they have finally outlasted the prior generation of jurists. *Id.*

As such, the School Board prays that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 04-1415

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
WILLIAM GARIBALDI AND CARLOS SAMUEL

Petitioners

v.

ORLEANS PARISH SCHOOL BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(6) authorizes a district court to grant relief from a final judgment in "extraordinary circumstances," the determination of which is left to that court's sound discretion. The question presented is whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law—regardless of the facts and circumstances that accompany such change.

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REPLY BRIEF FOR THE PETITIONERS

Petitioners William Garibaldi and Carlos Samuel ("the Relators") respectfully file this reply brief in support of the petition for writ of certiorari.

The brief in opposition of Respondent Orleans Parish School Board ("the Board") helpfully furnishes a précis of seemingly every case cited by the petition. Moreover, the brief helpfully reminds us—some thirty times in its twenty pages—that "extraordinary circumstances" is the governing standard for granting relief under Federal Rule of Civil Procedure 60(b)(6). What the brief does *not* do is controvert the petition's showing (1) that the decision of the Fifth Circuit is in conflict with the decisions of other courts of appeals; and (2) that the lower courts exhibit confusion concerning the authority of the district courts to grant relief under that rule in connection with a change in the decisional law.

Accordingly, the Relator's petition for writ of certiorari should be granted.

ARGUMENT

We address two points raised by the opposition brief.

I. In Practice, the Fifth Circuit Adheres to a Categorical Rule that a Change in Controlling Decisional Law Can *Never* Constitute "Extraordinary Circumstances."

The petition posits a circuit split on the question presented. The premise of the posited split is that the Fifth Circuit adheres to a categorical rule that a change in controlling decisional law can *never* constitute "extraordinary circumstances." Although the Board accuses the Relators of having "manufactured an alleged conflict" by "misstating the actual holding of the Fifth Circuit decision," Br. Opp. 5, it cannot reasonably be disputed that the decision below is only the latest in a long line of Fifth Circuit decisions that apply this categorical rule.

Some fifteen years ago, the Fifth Circuit laid down the following blanket rule regarding the extraordinary circumstances that all concede are required for relief under Rule 60(b)(6): "A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment." *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.), *cert. denied*, 498 U.S. 829 (1990). This Court has consistently held—and reiterated *just last week*—that "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, No. 04-6432, slip op. at 10 (June 23, 2005) (citing *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978)). Notwithstanding this prescribed deference, the Fifth Circuit over the course of many years has repeatedly relied on *Bailey*'s blanket rule to *overturn* the district court's exercise of discretion to grant Rule 60(b)(6) relief based on extraordinary circumstances in connection with a change in the decisional law.[1]

That brings us to the decision below, in which the Fifth Circuit *again* overturned the district court's discretionary determination of extraordinary circumstances and its consequent grant of relief under Rule 60(b)(6). In adhering to its long-standing and consistent practice in this regard, the court of appeals further confirmed its categorical position. Not content simply to "distinguish" the Eleventh Circuit's decision in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987), the court below refused explicitly to "assume or agree" that *Ritter* was correctly decided.

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[1] As cited in the petition (at 9), these decisions span some dozen years, from *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990) (relying on *Bailey*'s categorical rule to reverse the grant of Rule 60(b)(6) relief), through *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995) (same), *cert. denied*, 517 U.S. 1221 (1996), to *Hess v. Cockrell*, 281 F.3d 212, 216 & n.18 (5th Cir. 2002) (same). In the cited discussion, the petition incorrectly implied that *Bailey* itself reversed the grant of Rule 60(b)(6) relief. Actually, *Bailey* affirmed the denial of such relief.

App. 7a. More significantly, the Fifth Circuit repudiated as "dicta unnecessary to the . . . holding" its prior statement—*expressly based on Ritter*—that "relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, 'such as where the Supreme Court resolves a conflict between another circuit ruling and that case.'" App. 7a (quoting *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 n.6 (5th Cir. 1995) (citing *Ritter*, 811 F.2d at 1402-03), *cert. denied*, 517 U.S. 1221 (1996)).[2]

Other courts of appeals, more faithful to the rule that "Rule 60(b) proceedings are subject to only limited and deferential appellate review," *Gonzalez v. Crosby*, slip op. at 10, have on occasion *affirmed* the district court's *grant* of Rule 60(b)(6) relief in connection with a change in the controlling law. Along with *Ritter v. Smith*, examples include *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989), and *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988). Indeed, while necessarily much rarer, still other courts have even *reversed* a district court's *denial* of such relief. *See, e.g., Pichardo v. Ashcroft*, 374 F.3d 46, 55-56 (2d Cir. 2004). But we are unaware of *any* Fifth Circuit decision that does either. (So, apparently, is the Board, though it had every incentive to find and cite such a decision.)

In these circumstances—not to mention the strained distinctions drawn by the lower court between this case and *Ritter v. Smith*, *see* Pet. 11-13—it is simply not credible to assert that the "unique facts of each case," Br. Opp. 15, are sufficient to explain the different results in this case vis-à-vis *Ritter* and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir.

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[2] It is appropriate to note that in *Gonzalez v. Crosby*, this Court approvingly cited *Ritter v. Smith* as an example of a case in which the state properly (indeed, successfully) sought "to use Rule 60(b) . . . to reopen a habeas judgment granting the writ." Slip op. at 10 (emphasis deleted).

1975) (en banc), *cert. denied*, 423 U.S. 1079 (1976). To the contrary, the prevailing rule in the Fifth Circuit—in actual practice if not in we-expressly-acknowledge-a-circuit-split precision—is that a change in controlling decisional law can *never* constitute the extraordinary circumstances necessary for relief under Rule 60(b)(6). In adhering to this rule, the decision below stands in obvious conflict with the decisions of other courts of appeals.

The incongruity of the decision below is only magnified by comparing it to the decisions of this Court, both old and new. As described in the petition (at 15), *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), is a stark example of the Court's recognition that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's regular] rules." *Id.* at 26-27 (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)). After the instant petition was filed, moreover, the Court recognized in *Gonzalez v. Crosby* that a "change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment." Slip op. at 12 n.9; *see also id.* at 12 (*affirming* the district court's denial of Rule 60(b)(6) relief because the case sought to be reopened was "long since final," a circumstance compounded by the moving party's "lack of diligence in pursuing review of the [disputed] issue"). The decision below cannot be reconciled with the principles recognized by this Court.[3]

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[3] There is some suggestion in the opposition brief (at 3-4) that the existence of "extraordinary circumstances" is a *prerequisite* to the exercise of the district court's discretion to grant relief under Rule 60(b)(6), rather than the *occasion* for exercising such discretion. Even if this distinction exists, we fail to see its import. No court (and no party to this case) fails to acknowledge that extraordinary circumstances are the sine qua non of Rule 60(b)(6) relief. Moreover, this case simply does not present the question whether the district court has any discretion to *deny* relief after having found such circumstances.

II. The Opposition Brief Does Not Cast Doubt on the Confusion in the Lower Courts as to Their Ability to Grant Rule 60(b)(6) Relief Based on a Change in the Decisional Law.

Not even attempting to dispute the petition's showing (at 17) that the "recurrence of decisional-law related issues under Rule 60(b)(6) is surprisingly robust," the opposition brief tries to explain away the confusion in the lower courts on the ground that all of the cases "are dissimilar and each concern[s] uniquely different issues and facts." This explanation is entirely beside the point.

As to the application of the principle that the district courts have considerable discretion in granting or denying relief pursuant to Rule 60(b)(6), *see* Pet. 18, the opposition does not deny that the Second Circuit has not hesitated to *overturn* the district court's decisions in cases involving a change in the decisional law. *See, e.g., Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (reversing denial of relief); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-75 (2d Cir. 1994) (reversing grant of relief). The point is not whether these decisions are correct—indeed, they reached opposite results —or whether they are factually "dissimilar" to each other or to the decision below. Rather, the point is that they (like the Fifth Circuit decisions cited above) are hard to square with the principle that "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)," *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam), or the principle that "Rule 60(b) proceedings are subject to only limited and deferential appellate review," *Gonzalez v. Crosby*, slip op. at 10.

As to the effect of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), on the authority of district courts to grant Rule 60(b)(6) relief in connection with a change in the decisional law, *see* Pet. 19, the opposition brief simply does not confront the issue. The belief (erroneous, we believe) that *Plaut* "closed the door" on such relief is seemingly what explains the divergence between Judge Easterbrook's opinions

in *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988), and *Norgaard v. DePuy Orthopaedics*, 121 F.3d 1074, 1076 (7th Cir. 1997).[4] Again, the issue is not the correctness vel non of these decisions but whether they stand as examples of confusion in the lower courts as to the availability of Rule 60(b)(6) relief in cases of this sort.

Accordingly, review is further warranted because the question presented is both recurring and a source of confusion in the lower federal courts.

CONCLUSION

In pleading for the Court to deny the petition because "[l]itigation must end some time," Br. Opp. at 19, the Board makes a bare "appeal to the virtues of finality," *Gonzalez v. Crosby*, slip op. at 4. As the Court has explained, however, that "policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Id.* Moreover, it has long been the case that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the] rules." *Gondeck*, 382 U.S. at 26-27. To be sure, the contrary practice prevailing in the Fifth Circuit—that a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) based on a change in the controlling decisional law, regardless of the facts and circumstances accompanying such change—has the virtue of simplicity and ready application. But the continuing prevalence of such a practice in one court of appeals, in conflict with other courts, should not go unreviewed by this Court.

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[4] Curiously, the opposition asserts (at 17) that *Tonya K.* was "not really a Rule 60(b)(6) case." That assertion is, shall we say, difficult to reconcile with the opinion's own account of the case: "The plaintiffs promptly filed a motion under Fed. R. Civ. P. 60(b)(6), asking the district court to reinstate their request for attorneys' fees . . . . The district court granted that request. . . . Both [defendants] have appealed, although neither challenges the amount of the award." 847 F.2d at 1245.

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Dated: June, 2005.

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